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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 1984

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QUESTION PRESENTED

Whether adherence by the members of a professional sports league to the league agreement designating the locations in which each member will conduct league operations constitutes a conspiracy among business competitors condemned by Section 1 of the Sherman Act.[1]

[1] Petitioners do not make, and this question does not raise, any contention that all actions by a league and its members are beyond attack under Section 1 of the Sherman Act.

THE PARTIES

Petitioners-defendants are the National Football League (NFL), a professional sports league organized as an unincorporated association, and twenty-seven of its twenty-eight member clubs.[2] Intervenor-defendant Oakland Coliseum will separately petition for review. Respondents-plaintiffs are the Los Angeles Memorial Coliseum Commission (Coliseum) and the Oakland Raiders, Ltd. (Raiders), the twenty-eighth NFL member club, now operating as the Los Angeles Raiders.

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[2] Baltimore Football Club, Inc. (Indianapolis Colts); Buffalo Bills, Inc.; Chargers Football Company (San Diego Chargers); Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; The Five Smiths, Inc. (Atlanta Falcons); Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New Orleans Saints Louisiana Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc. (Washington Redskins); Rocky Mountain Empire Sports, Inc. (Denver Broncos); San Francisco Forty-Niners; Seattle Professional Football; St. Louis Football Cardinals Company; and Tampa Bay Area NFL Football, Inc.

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OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in its cases Nos. 82-5572 to 82-5574, entitled *Los Angeles Memorial Coliseum Commission* v. *National Football League, et al.*

OPINIONS BELOW

The opinion of the Court of Appeals' majority and the related dissenting opinion are reported at 726 F.2d 1381 (9th Cir. 1984) and are at Appendix A, pp. 1a-51a. That court's order denying a petition for rehearing and rejecting a suggestion for rehearing en banc is at Appendix F, pp. 95a-96a. The opinion of the District Court holding that the NFL location agreement is, as a matter of law, a conspiracy among independent business competitors within Section 1 of the Sherman Act is reported at 519 F. Supp. 581 (C.D. Cal. 1981) and is at Appendix B, pp. 53a-59a. The order of that court enjoining

enforcement of the league location agreement is at Appendix E, pp. 93a-94a.

JURISDICTION

The final judgment of the Court of Appeals was entered on February 28, 1984, and petitioners' timely petition for rehearing was denied on June 19, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and an Act of Congress in 1966 exempting the consolidation of the NFL and another professional football league (the American Football League (AFL)) from the antitrust laws, P.L. 89-800, 15 U.S.C. § 1291 (1982), are set forth in Appendix G, p. 97a.

STATEMENT OF THE CASE

The NFL produces professional sports league entertainment consisting of a series of integrally related athletic contests. Each member club annually presents 16 regular season football games, which are followed by post-season playoffs and eventually the Super Bowl. Each member club is organized under separate ownership, thus assuring public confidence in the integrity of each team's efforts on the playing field.

The respondent Coliseum operates a stadium in Los Angeles suitable for the presentation of sports and other entertainment events. Commencing in 1970, the respondent Raiders conducted NFL operations in Oakland, California, pursuant to league agreement. For the prior ten years it had conducted AFL operations in Oakland, under a similar league agreement.[1]

[1] From 1960 to 1966, the two leagues operated as separate, competing leagues. In 1966, they agreed in principle to a plan for consolidating their operations into an expanded single league, with each of the then-existing AFL member clubs, including the Oakland Raiders, to become NFL members. Congress approved that plan in the same year. P.L. 89-800 (1966), 15 U.S.C. § 1291 (1982). The expanded league commenced operations in 1970.

All of the NFL members "subscribe to and agree to be bound by the Constitution, By-Laws, Rules and Regulations of the League and any amendments or modifications thereof." NFL Const. and By-Laws, Section 3.3(A)(6) (PX 38; 13 Tr.2d 2311-12). This interdependent network of commitments governs the production and presentation of NFL football—a product that must necessarily be produced by all the members acting in concert. Through the NFL, the members establish divisions, conferences, and scheduling patterns that foster public interest in their product; negotiate national television contracts, the proceeds of which are divided equally among the members; agree upon the division of gate receipts between home and visiting teams; share the costs of centralized league management activities; and jointly direct all other phases of the League's operations. As the court below noted, over 90 percent of the members' total revenues are shared in accord with their agreement. (12a.)

Each NFL member "holds a franchise from the League to operate a professional football club in a designated city." Section 3.4. The receipt of a League franchise constitutes a commitment to the other members to operate in a designated home location, which is defined as "the city in which such club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . ." Section 4.1.

In this case, respondents challenge the legality of Section 4.3 of the NFL Constitution and By-Laws, which provides in pertinent part:

> "No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League." [2]

Respondents contend that this limitation on an individual member's ability to determine unilaterally the location in which

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[2] The three-fourths voting standard of Section 4.3 is the norm for the conduct of virtually all League decisionmaking.

it will conduct League operations violates Section 1 of the Sherman Act.

In 1978, the Coliseum commenced this action against the NFL and all 28 of its members, including the Oakland Raiders, claiming that Section 4.3 illegally prevented it from obtaining an NFL tenant. From 1978 until 1980, the Raiders, represented by League counsel, joined in the League's defense of Section 4.3. In early 1980, the Raiders, without seeking approval under Section 4.3, announced their intention to abandon Oakland—where they operated in the Bay Area along with the League's San Francisco 49ers—and unilaterally to relocate to Los Angeles, where they would operate along with the League's Los Angeles Rams, who play their home games in nearby Anaheim.

The NFL member clubs investigated the circumstances of the Raiders' proposed unilateral relocation, and at a meeting in March, 1980, voted without dissent that the Raiders should continue to conduct League operations in Oakland. The Raiders thereafter played the 1980 and 1981 NFL seasons in Oakland.

After deciding to abandon Oakland, the Raiders became a co-plaintiff in this action, joining the Coliseum in seeking both an injunction barring enforcement of Section 4.3 and damages for the additional profits each plaintiff allegedly would have made if the Raiders had transferred to Los Angeles immediately following their decision to relocate. The District Court directed bifurcation of the issues of liability and damages, if any. At the first trial, on cross-motions for directed verdict, the District Court ruled that, as a matter of law, each league member should be treated as an independent economic competitor of each other member in considering whether the league location agreement violates Section 1 of the Sherman Act. (53a-59a.) This first trial ended with a hung jury.

At the second liability trial, the jury was again instructed to consider the league location agreement as an agreement among independent economic competitors. The jury found that such agreement constituted an agreement in restraint of trade that violated Section 1, and the trial court enjoined enforcement of Section 4.3 of the League's Constitution. (92a-94a.)

After entry of the injunction, the Raiders played the 1982 and 1983 NFL seasons in Los Angeles. In doing so, they continued as an NFL member, joined with the other members in conducting NFL operations in Los Angeles and elsewhere, and retained all benefits of League membership, including full participation in the League's television and other joint revenue-producing activities.

On appeal, even the majority of the Ninth Circuit panel acknowledged that "the NFL teams are not true competitors, nor can they be" and that "the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation." (15a, 23a.) Nonetheless, in a split decision, the court affirmed the holding of the District Court that, as a matter of law, the league location agreement constituted a conspiracy among economic competitors subject to Section 1 of the Sherman Act. The majority found no error in the trial court's rule of reason instructions or in its denial of motions seeking trial of the action outside Los Angeles in a neutral district.[3]

Judge Spencer Williams, sitting by designation, dissented. His opinion concluded, based on its comprehensive analysis of the NFL's operations, that the NFL members' agreement on the location of franchises constitutes, as a matter of law, action by a single enterprise that does not restrain competition among economic competitors. (34a-51a.) Judge Williams distinguished intra-league agreements, such as that relating to team location, from extra-league agreements reaching beyond the production of NFL football that, in his view, would be subject to Section 1 of the Sherman Act.

The damage trial resulted in judgments for the Coliseum of $14.58 million and for the Raiders of $34.65 million, both after

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[3] The trial judge (Judge Pregerson) was appointed to the Court of Appeals before the first trial. While on that court, he presided at both trials on the merits and also at the subsequent damages trial. The Court of Appeals' panel was thus called upon to review a series of rulings and actions by a member of that court.

trebling. Petitioners' appeal from these judgments has been briefed but not yet argued to the Court of Appeals.[4]

REASONS FOR GRANTING THE WRIT

The courts below struggled with an important question that has perplexed the lower courts and resulted in confused and conflicting decisions—the manner of applying Section 1 of the Sherman Act to joint actions by members of professional sports leagues. Such leagues are a unique form of business organization with broad and increasing commercial, cultural, and public interest significance. This question, which affects numerous cases pending in the federal courts, has not been, but should be, settled by this Court.

In deciding this question, the Court of Appeals' majority failed to accord significance to the economic realities and single enterprise characteristics of sports leagues and acted contrary to the principles underlying Section 1 of the Sherman Act as most recently applied by this Court in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984). Its decision further conflicts with earlier decisions of this Court concerning the ambit of Section 1 with respect to internal arrangements within such enterprises. The decision thus renders illegal constructive business arrangements that enhance consumer welfare and do not restrain business competition, and rewards those who choose to violate such arrangements.

I. The Application Of Section 1 Of The Sherman Act To Professional Sports Leagues Presents Important Questions That Have Not Been, But Should Be, Considered By This Court

Professional sports league operations are of vital interest not only to the member clubs and players but also to states,

[4] Whether there has been a violation of the antitrust laws is the sole issue presented here. It is petitioners' position that neither the Coliseum nor the Raiders has suffered compensable antitrust injury under Section 4 of the Clayton Act, 15 U.S.C. § 15, even if the claimed violation is proven. Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). Those issues are presented in the appeal of the damage judgment that is pending before the Court of Appeals.

municipalities, and millions of fans and taxpayers. By one estimate, seventy percent of all professional sports facilities are publicly owned. Noll, *Government and the Sports Business* 326 (1974). Some 50 state and local governments have spent more than $6 billion in the past two decades on stadiums for professional baseball and football. S. Rep. No. 98-592, 98th Cong., 2d Sess. 2 (1984). Professional leagues in all of the major sports—football, baseball, basketball, hockey, and soccer—are necessarily joint business enterprises owned in common by the league members and governed by agreements among them.

While this Court held almost 30 years ago that professional league football is subject to the antitrust laws, *Radovich* v. *National Football League*, 352 U.S. 445 (1957), no decision of the Court provides meaningful guidance as to how Section 1 of the Sherman Act should be applied to the joint decisionmaking of professional league members.[5] As a result, the courts have struggled increasingly with the asserted applicability to sports leagues of antitrust precedent governing the actions of horizontal competitors.[6]

This lack of guidance has produced litigation chaos. Some decisions recognize that leagues are single enterprises or partnerships.[7] Others, however, have treated leagues as

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[5] Largely because of baseball's early exemption (Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922)), the first six decades of the Sherman Act's development produced no antitrust doctrine applicable to professional sports leagues.

[6] Economists and commentators have recognized the unique nature of a *league* sports product. L. Koppett, Sports Illusion, Sports Reality 285 (1981) ("The product is *not* 'The Dallas Cowboys,' getting together with another product called 'The Philadelphia Eagles.' The product is a National Football League game.") (emphasis in original); W. Neale, "The Peculiar Economics of Professional Sports," 78 Q.J. Econ. 1 (1964). *See also* WTWV, Inc. v. National Football League, 678 F.2d 142, 144-45 (11th Cir. 1982) (NFL members operate "as co-producers of a common entertainment product"); and Reynolds v. National Football League, 584 F.2d 280, 287 (8th Cir. 1978) (courts cannot ignore "the structured nature of any professional sport based on league competition").

[7] San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974); *see also* Levin v. National Basketball Association, 385 F.

(footnote continues)

"conspiracies," subjecting every type of intra-league decision or agreement to Section 1 review.[8] Three courts of appeals have done so while holding the NFL to be a joint venture and not a mere association of economic competitors.[9] But other courts have applied to league members the *per se* standards ordinarily applicable only to naked restraints among horizontal competitors.[10] Even when the interdependence of league members has been recognized, the courts have often relied on precedents involving horizontal competitor relationships, with the result that their decisions reflect no coherent antitrust doctrine.[11]

(footnote continued) .

Supp. 149, 152 (S.D.N.Y. 1974) (league members are "partners" not competitors); and Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 567-68 & n.22 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 2657 (1984).

[8] *E.g.*, Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (safety rule on employment of physically handicapped players); Carlock v. National Football League, No. SA-79-CA-133 (W.D. Tex. 1982) (league decision not to purchase officiating equipment).

[9] *See* North American Soccer League v. National Football League, 670 F.2d 1249, 1251 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) ("the NFL is an unincorporated joint venture . . . ."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) ("the NFL clubs . . . are not *competitors* in any economic sense. The clubs operate basically as a joint venture . . . ."); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (NFL has "some of the characteristics of a joint venture"); *see also* United States v. National Football League, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953).

[10] *E.g.*, Linseman v. World Hockey Association, 439 F. Supp. 1315 (D. Conn. 1977); Bowman v. National Football League, 402 F. Supp. 754 (D. Minn. 1975); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971). *See also* Haywood v. National Basketball Association, 401 U.S. 1204 (1971) (Douglas, J., in chambers).

[11] *E.g.*, Smith v. Pro Football, Inc., *supra*, 593 F.2d at 1178-79, 1186-88; Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *jury verdict aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *see* S. Robinson, *Recent Antitrust Developments—1979*, 80 Col. L. Rev. 1, 19-22 (1980). Some of the cases have involved league agreements limiting member club actions in the employment of players, and therefore were complicated by an issue not present in this case—the scope of the labor exemption from the antitrust laws. *See, e.g.*, McCourt v. California

(footnote continues)

The specific issue of team relocation has spawned protracted litigation, often marked more by forum shopping than by recognizable principle.[12] With respect to the Raiders' move itself, no fewer than eight suits have been prosecuted in federal and state courts, including actions by Oakland customers asserting that the Raiders' relocation restrained trade in Northern California and by Los Angeles authorities asserting that the City of Oakland's attempted acquisition of the Raiders in eminent domain violated the Clayton Act.[13] Even if the NFL had not opposed the Raiders' move from Oakland, protracted antitrust litigation would have ensued, for Oakland's public authorities would then have sued the League for establishing the remaining NFL team in Northern California—the San Francisco 49ers—as a monopoly in the Bay Area.[14] League agreements on team location are also presently the subject of federal antitrust litigation in both professional basketball and professional hockey.[15]

(footnote continued)

Sports, Inc., 600 F.2d 1193 (6th Cir. 1979). *See also* Flood v. Kuhn, 407 U.S. 258, 294-96 (1972) (Marshall, J., dissenting); J. Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, 44 L. & Contemp. Prob. 109 (1981).

[12] *See, e.g.*, State v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis.), *cert. denied*, 385 U.S. 990 (1966); J. Weistart & C. Lowell, The Law of Sports § 5.11 at 733-35 (1979) (commenting on *Milwaukee Braves)*.

[13] Downing v. Oakland Raiders, Nos. 80-4382 & 80-4513 (9th Cir. 1983), *petition for cert. pending*, No. 83-1844; and Los Angeles Memorial Coliseum Commission v. City of Oakland, 717 F.2d 470 (9th Cir. 1983).

[14] The Raiders' proposed move—and the absence of coherent antitrust doctrine in this field—thus confronted the NFL with an extraordinary Hobson's choice. *See* "Antitrust Policy and Professional Sports," Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 97th Cong., 2d Sess. 416 (1982) (testimony of Oakland Mayor Lionel Wilson).

[15] The San Diego Clippers franchise of the National Basketball Association has relocated to Los Angeles for that league's 1984 season. That relocation is being challenged in National Basketball Association v. SDC Basketball Club, Inc., No. 84-1430 B (CM) (S.D. Cal.). The National Hockey League's rejection of a proposal by its St. Louis member to sell its franchise for transfer to a Canadian city is being challenged in federal court in Missouri. Ralston Purina Co. v. National Hockey League, No. 83-1264-C(3) (E.D. Mo.).

Confusion as to the validity of the NFL location agreement under the antitrust laws has, in addition, produced governmental action at the state level—principally expansive assertions of eminent domain authority for municipal acquisitions of professional sports franchises. The City of Oakland is pursuing such an eminent domain suit to return the Raiders to Oakland. *See City of Oakland* v. *Oakland Raiders,* 32 Cal.3d 60, 183 Cal. Rptr. 673 (1982). But the Ninth Circuit's decision in this case has recently been interpreted by a California trial court to pose serious impediments to the City's eminent domain suit.[16]

As a result of the Ninth Circuit's decision in this case, the NFL's Baltimore Colts unilaterally elected to relocate to Indianapolis after years of League operations in Baltimore. As to that move, no fewer than five actions are pending, including a federal interpleader action positing mutually exclusive claims of Indianapolis and Baltimore to the Colts' franchise,[17] a Section 1983 suit against Baltimore public officials,[18] and federal court actions against both the Colts and the NFL asserting eminent domain claims under emergency Maryland legislation.[19]

The impact of the decisions below on state, municipal, and public interests has given rise to deep Congressional concern.[20] Hearings in the current session concerning the validity of sports

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[16] City of Oakland v. Oakland Raiders, No. AO 76044 (Cal. Super. Ct., July 20, 1984), slip op. at 14, 25, *petition for writ of mandate and application for injunctive relief pending in California Supreme Court,* No. S.F. 24778.

[17] *See* Indianapolis Colts v. Mayor and City Council of Baltimore, No. IP 84-652-C (S.D. Ind.), *stay of injunction issued,* 733 F.2d 484 (7th Cir.), *application for order vacating stay denied,* No. A-1014 (U.S., June 14, 1984), *order granting injunction rev'd,* No. 84-1649 (7th Cir., August 10, 1984).

[18] Indianapolis Colts v. Mayor and City Council of Baltimore, No. B 84-2560 (D. Md.).

[19] Mayor and City Council of Baltimore v. Baltimore Football Club, Inc., No. B-84-1294 (D. Md.); Mayor and City Council of Baltimore v. National Football League, No. B-84-2026 (D. Md.). *See also* In re Baltimore Football Club, Inc., Debtor, No. 84-B-0526 (D. Md.) (bankruptcy petition filed to bar Colts' removal from Maryland).

[20] *See* 128 Cong. Rec. S. 9329-331 (daily ed., July 28, 1982); 128 Cong. Rec. S. 15783-784 (daily ed., December 20, 1982); 128 Cong. Rec. H. 2412 (daily ed., May 21, 1982); and "Antitrust Policy and Professional Sports," Hearings, *supra* n.14.

league location agreements have produced a recognition that the issues raised by the rulings below "present basic and important questions of Federal statutory law that should be considered and resolved by the Supreme Court." [21]

The respondent Raiders is the first professional sports league member to challenge a league agreement as an asserted independent horizontal competitor of each other member, while simultaneously asserting that all members remain fully obligated to conduct joint business operations with it on agreed terms. The decisions below thus treat a member of a single enterprise as a "competitor," in complete disregard of true business competition that the Sherman Act protects. *Compare Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20-23 (1979).

The need for guidance in the application of Section 1 to sports league agreements is well illustrated in the majority opinion below. It explicitly conceded that professional football is "an industry which does not readily fit into the antitrust concept," and observed that while Section 1's purpose is to prohibit agreements among competitors, it nonetheless applies here even though ". . . the NFL teams are not true competitors, nor can they be." (15a.) The majority further described the NFL as a "unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors." (33a.) The inappropriateness of existing antitrust precedent, convincingly shown in the opinion of the dissenting judge below, was thus also acknowledged by the panel majority.[22]

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[21] *See* proposed H. Res. 574 (1984), Cong. Rec. H. 9062 (daily ed., August 10, 1984). *See also* Senate Comm. on Commerce, Professional Sports Team Community Protection Act, S. Rep. No. 98-592, 98th Cong., 2d Sess. 14 (1984). Pending legislative proposals do not "address (and therefore will not provide a remedy to) the antitrust problems raised by the ninth circuit decision," but instead entail government regulation with special grants of District Court jurisdiction for judicial review. *Id.* at 18.

[22] The majority seriously misconceived league operations in stating that the league "structure is very similar to that in" United States v. Sealy, Inc., 388 U.S. 350 (1967). In *Sealy* each of 30 licensees independently manufactured and sold mattresses under the Sealy name and agreed not to compete

(footnote continues)

While the courts have struggled with agreements among professional league members, commentators have urged express judicial recognition that certain league agreements cannot be tested under standard "conspiracy" concepts. For example, Professor Bork, now judge of the Court of Appeals for the District of Columbia Circuit, has observed that "the concept of business competition may be irrelevant as applied to the relationship between members of a league." R. Bork, *Ancillary Restraints and the Sherman Act,* 15 ABA Antitrust Law Section 211, 233 (1959).[23]

The leading academic treatise on sports law also recognizes that the inherent "jointness" of professional sports leagues and the absence of intra-league business competition make it inappropriate to subject leagues to conspiracy "principles designed to control the behavior of firms which are fundamentally different. In its basic nature, a league-firm is not a conspiracy. To treat it as such is to force results which are unlikely to achieve any purpose intended by Congress." J. Weistart & C. Lowell, *The Law of Sports* § 5.11, at 757-58 (1979). And a

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(footnote continued)

with each other. There was no requirement of joint production and the agreement combined otherwise independent sources of economic power. Here the challenged agreement determines the locations at which all league members conduct their joint operations, and the league product is necessarily produced on a joint basis by the NFL members as their sole product. For the same reasons, the majority's reliance upon United States v. Topco Associates, Inc., 405 U.S. 596 (1972), was similarly misplaced.

[23] Professor Bork has also stated:

> "There are some activities . . . which could not exist at all without the restraint and these should be lawful no matter what the market share of the parties. A prime example is league sports . . . . Sooner or later the [Supreme] Court is going to have to face the issues raised by the restraints in organized sports, and this solution [agreements permitted within a single league] seems to me dictated by the needs of leagues and by the analogy of the league to partnerships or firms." R. Bork, *Resolved: Present Antitrust Restraints on Pricing Should be Relaxed,* 41 A.B.A. Antitrust L.J. 5, 13 (1971).

See also M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model,* 82 Mich. L. Rev. 1 (1983).

knowledgeable commentator has found "something drastically wrong with a methodology" of antitrust decision that, while holding league members "not competitors in any economic sense" (*Smith* v. *Pro Football, Inc., supra,* 593 F.2d at 1178-1179), applies routine Section 1 standards to professional sports league issues. S. Robinson, *Recent Antitrust Developments-1979,* 80 Col. L. Rev. 1, 21-22 (1979).[24]

This Court's decision last Term in *National Collegiate Athletic Association* v. *Board of Regents,* 104 S. Ct. 2948 (1984), underscores the need for guidance in the application of Section 1 to sports leagues. The NCAA television plan, adopted by the NCAA's 800 member institutions, concededly constituted a conspiracy or combination within Section 1 of the Sherman Act. 104 S. Ct. at 2959. The television plan restrained competition *among* leagues on an *inter*-league level, not merely *within* a conference or league. *Id.* at 2967. However, in condemning that plan, the Court indicated that the antitrust laws were not offended by rules defining "the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." 104 S. Ct. at 2969. The location agreement challenged here relates precisely to the sharing among NFL members of "the responsibilities and the benefits of the total venture."

With respect to team location, the members of a league function as a single firm deciding where its business is to be located. *See* J. Weistart & C. Lowell, *supra,* at 698-701. Agreement on team location is central to the operation of a league. It serves as a principal incentive for member investment in the league enterprise and in the operation of each member club in its designated community. It further protects the interest of each member in the balanced location of all teams, enabling the league to make judgments on the preferred location of each team to maximize public interest in the league product and the members' shared benefits. Other limitations on unilateral member action are also inherent in the functioning of

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[24] A respected observer of professional sports has concluded that current antitrust uncertainty places "an unfair burden on this industry" and thus "cries out for clarification." L. Koppett, *Sports Illusion, Sports Reality* 282 (1981).

a professional league. To produce a league product, the members must operate pursuant to many agreements diminishing "competition" among them.[25] As Professor Bork has put it, "[a]greements to refuse to deal are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities. All league sports from the Ivy League to the National Football League, an increasingly wider spectrum, rest entirely upon the right to boycott." R. Bork, *The Antitrust Paradox* 332 (1978); *see also id.* at 278-79.

What is required here is a reasoned analysis of this "unique business organization," as the Court of Appeals described the NFL, and a principled determination of whether antitrust rules developed for "arrangements between actual competitors" (33a) apply to agreements among league members designating the locations of league operations.

II. The Decisions Below Erroneously Treat The Intra-Enterprise Conspiracy Doctrine As Dispositive

This Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984), thoroughly discredits the principal cases invoked by the courts below in concluding that precedent requires the NFL location agreement to be viewed as a conspiracy among independent competitors falling within Section 1 of the Sherman Act. Despite explicit acknowledgment that the NFL's members cannot be true economic competitors (pp. 5, 11, *supra*), both courts found determinative for Section 1 analysis the separate organization (as a corporation or partnership) of each NFL member and the absence of direct profit or loss sharing in an accounting or balance sheet sense. (11a-12a; 54a.) These wholly formal aspects of separateness led both courts to read this Court's "intra-enterprise conspiracy" decisions as requiring that the NFL's members be

[25] For example, league members agree to produce a maximum number of games in each season; to present games against certain member teams but not against others; to operate in divisions and conferences that require members to deal with certain members while preventing them from dealing with other members not scheduled for divisional or conference play; and to designate the location of each team's "away" games in a manner that prevents individual clubs from unilaterally selecting the locations at which they will play.

treated as horizontal competitors whose internal agreements are subject to rule of reason scrutiny under Section 1.

The District Court viewed four decisions of this Court as demanding such a result.[26] The two most recent of these decisions, *Perma Life Muffler* and *Timken Roller Bearing,* were also relied on by the Court of Appeals' majority, which acknowledged that while "these cases and others have been the subject of some criticism, . . . they remain the law." (9a-10a.)

Moreover, it was not the logic of these precedents that led to the judgment below, but rather their mere presence on the books. Thus, the majority noted that a district court had held a hockey league's team location agreement not to be a conspiracy under Section 1 and that the members' refusal to approve a team's relocation did not restrain business competition among the members. *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F. Supp. 966 (C.D. Cal. 1974). (13a, n.4.) While the majority found this decision and a law review article approving its analysis "persuasive," [27] it concluded "that existing precedent" could not be "ignored." *(Id.)*

The four decisions that thus provided the major legal support for the rulings below constitute the source of the so-called intra-enterprise conspiracy doctrine—that separate incorporation even within a parent-subsidiary relationship supports the application of conspiracy principles under Section 1. In *Copperweld,* this Court rejected that doctrine; with respect to these four decisions, this Court said: "To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled." 104 S. Ct. at 2745.

In view of the weight accorded these decisions by the courts below, this Court's intervening decision in *Copperweld,* without more, warrants review of this important court of appeals' decision that expressly and fundamentally rests upon now-discredited precedents.

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[26] 54a-55a, *citing* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); and United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[27] *See* Grauer, *supra,* n.23.

III. The Decisions Below Exalt Form Over Substance And Conflict With This Court's Decisions Governing The Application Of Section 1 Of The Sherman Act To Jointly Conducted Operations

A. *Copperweld* And Related Decisions

This Court's analysis in *Copperweld* leaves no doubt that both courts below erroneously ignored economic substance and permitted purely formalistic considerations to govern the application of Section 1 to the NFL team location agreement. That analysis was not novel. Several terms earlier, in *United States* v. *Citizens & Southern National Bank,* 422 U.S. 86, 119 (1975), the Court characterized as a "total lack of realism" a claim that a common enterprise consisting of a parent bank and several separate banks in which the parent held five percent stock interests was a conspiracy in violation of Section 1.[28] Previously, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.,* 370 U.S. 19, 29 (1962), the Court dismissed a Section 1 charge against several thousand growers on the ground that they were "in practical effect and in the contemplation of the statutes" an "organization" or "association" even though they have "formally organized themselves into three separate legal entities."

The central criticism of the intra-enterprise conspiracy doctrine, the Court noted in *Copperweld,* was that it treated "as the concerted activity of two entities what is really unilateral behavior flowing from the decisions of a single enterprise." 104 S. Ct. at 2740. That reasoning is directly applicable to the NFL; the members have of necessity combined into a lawful and procompetitive joint enterprise solely to engage in the production of a single product—NFL football. The challenged location agreement is a fundamental element of that enterprise. The Court further emphasized that conspiracy results only when "two or more entities that *previously pursued their own interests separately* are combining to act as one for their common benefit." *Id.* at 2741 (emphasis supplied). The NFL

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[28] The Court reached this conclusion notwithstanding the independent decisionmaking authority of the banks on such matters as loan policies, setting of interest rates, personnel policies, and the like. *See* 422 U.S. at 113.

members are not entities that "previously pursued their own interests separately"; indeed the success or failure of the individual members as business organizations is inextricably tied to the success of the NFL. In holding that the NFL members were conspirators under Section 1, while acknowledging that "[t]he NFL teams are not true competitors, nor can they be," the majority below surely looked "to the form of an enterprise's structure and ignore[d] the reality." *Id.* at 2743. This is the very analytical approach condemned in *Copperweld.*

The NFL, as the courts below recognized, was not organized by independent competitors as a trade association or to limit output, fix prices, allocate territory, or restrain competition in markets for a product or service that each would otherwise produce independently.[29] It was organized to create and develop a product that had never before existed, that could not be produced by any single member, and that is produced through a unique league organization. The majority itself recognized that the "combination"—the NFL itself—was entirely legal. (23a.) The NFL is thus an example, as the Court put it in *Copperweld,* of the "increasing complexity of corporate operations"; accordingly, it "should be free to structure itself in ways that serve efficiency of control, economy of operation, and other factors dictated by business judgment without increasing its exposure to antitrust liability." *Id.* at 2743.

There can be no question as to the sweep of the decision of the court below. Everything a league and its members do is accomplished by agreement or joint decision of the members.

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[29] The majority's concern that collective action by the league members would allow them "to extract excess profits" and charge "unreasonable and arbitrary prices" (16a) bears no relation to the issues in this case. It was not even charged, let alone proven, that enforcement of the league location agreement would have such an effect. The majority noted two areas of off-the-field competition between the NFL members: (1) for players, coaches, and management personnel and (2) for fan support, media space, and revenues where two teams operate in close proximity. Only the latter has any relevance in assessing the competitive impact of the team location agreement challenged here. Such "competition," apart from being a wash in this case in that the Raiders would operate either in Northern California in a two-team NFL area or in Southern California in an equivalent two-team area, is wholly incidental in the production of a league product.

As the dissenting judge recognized, the majority holding "is tantamount to ruling that the NFL structure is itself *per se* invalid under the Sherman Act § 1" and "will spell the end of sporting leagues." (47a-48a.)

The dissenting judge also made clear that the issue here is not immunity from Section 1 but rather the proper application of Section 1 to parties, however formally organized, engaged in a legitimate joint enterprise. He viewed Section 1 as fully applicable to league agreements that impinge on activities "outside the confines of intra-league regulation of production of the sport;" but he recognized that Section 1 does not apply to regulations that directly involve only the joint production of NFL football and control all the members in their joint engagements. (44a.) The issue here relates to the members' functioning as joint producers of NFL football in a broad entertainment market, not to individual operations of the clubs in markets in which each is a buyer of services such as those of player-employees. To the extent an intra-league agreement restrains trade with outside competitors of the League or its members, the League and its members would be answerable under Section 1 of the Sherman Act.[30] And the League would remain subject to the full sweep of Section 2 of the Act.

The dissenting judge thus perceived that a challenge to an intra-league agreement that relates solely to the joint production of league football demands an inquiry into the nature of the league, as a productive enterprise, rather than into the formalities of the members' organization or profit accounting.[31]

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[30] In a case that the NFL submits was an erroneous application of this principle, North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), an NFL regulation was condemned because it was held unreasonably to restrain competition between professional football and professional soccer by restricting investment in the latter. The League urged, and Justice Rehnquist agreed (459 U.S. 1074, 1077), that the Court of Appeals erred in concluding that the regulation in question violated the rule of reason.

[31] Unlike the defendants in Associated Press v. United States, 326 U.S. 1 (1945), and Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the NFL members have not joined together to provide a service that merely facilitates the conduct of the independent business activities of each member.

(footnote continues)

Such an inquiry is strikingly similar to that made by this Court in *Copperweld* in rejecting the intra-enterprise conspiracy doctrine. There the Court granted no immunity from Section 1, but simply confined that Section, as intended by Congress, to agreements that brought together sources of economic power that had previously been truly independent. 104 S. Ct. at 2740-41, 2744. The agreement among NFL members as to where each will participate jointly with other League members in producing a common product does not represent such a bringing together of sources of economic power that are truly independent.

In 1966, Congress examined the operations of sports leagues and enacted antitrust exemption legislation in clear recognition of the joint nature of league operations. That statute authorized the consolidation of the two existing professional football leagues into a single league, the NFL. (97a.) [32] Congress conditioned approval of the consolidation upon a requirement that the "expanded single league" increase the total number of teams previously operating, *id.*, and the leagues committed that no club would be relocated as a result of the consolidation. *See* Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 89th Cong., 2d Sess. 80-83 (1966). While this action by Congress does not accord antitrust exemption to any league actions other than the consolidation of the two leagues, it demonstrates congressional acknowledgment of the appropriateness of joint league determination of team locations.

The majority below viewed the NFL's operation essentially as Congress did in 1966. Thus, the majority expressed

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The NFL members produce no product on their own as did the newspapers and stock brokers involved in those cases. They are joined together in the NFL for the sole purpose of producing the single product in which all are jointly engaged.

[32] Absent such legislation, the combination of the two leagues into a single enterprise would have been subject to a rule of reason inquiry. Once the legality of the enterprise or joint venture is determined, however, joint decisions that are necessarily made in the conduct of the enterprise are not subject to such an inquiry.

agreement that "the nature of NFL football requires some territorial restrictions" and "some control over the placement of teams to ensure NFL football is popular in a diverse group of markets." (23a, 24a.) The majority's ultimate decision, however, was founded on the lack of "express recognition" of "objective factors" and a "procedural mechanism to ensure consideration" of such factors in team location decisions. (26a-27a.) But these factors are quite irrelevant to the antitrust analysis. If league members are not competitors but are engaged in a joint enterprise, league limitations and controls with respect to team locations are inherent in the joint production of their common product, and are not conspiracies condemned by Section 1. Stated differently, the issue under Section 1 is whether the league agreement on team location constitutes a restraint of *competition among true competitors*—not whether it limits individual members' freedom of choice or guarantees some nebulous form of commercial due process.[33]

B. Decisions Establishing Ancillary Restraint Principles

The decisions below conflict with settled principles established in the early years of Sherman Act jurisprudence concerning the relationship of the common law of trade restraints to the ambit of Section 1 of the Act. The "broad mandate" of the Sherman Act is to be interpreted "by drawing on common-law tradition." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 688 (1978). As has been noted,

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[33] Citing Murray v. Toyota Motor Distributors, Inc., 664 F.2d 1377, 1379 (9th Cir.), *cert. denied,* 457 U.S. 1106 (1982), all three Court of Appeals judges agreed that the NFL members' capacity to conspire for Section 1 purposes in agreeing upon team locations was a jury question unless it presented an issue upon which reasonable men could not differ. (7a-8a, 38a.) The trial court, however, took this question from the jury even though that court repeatedly recognized it as a "close" question (54a), and the judges on the Court of Appeals differed sharply on how it should be answered. At a minimum, therefore, and particularly in light of the intervening decision of this Court in *Copperweld,* petitioners are entitled to a jury trial with proper instructions on the question whether the league agreement on team location combines previously competing economic sources of power as articulated in *Copperweld.*

professional sports leagues are common enterprises in the nature of a partnership or joint venture.[34] At common law, members of partnerships were not allowed to compete against the firm in the production of the firm's product. *Wheeler* v. *Sage,* 1 Wall. (68 U.S.) 518 (1863); *Latta* v. *Kilbourn,* 150 U.S. 524 (1893). According to the Court in *Latta,* it was "well settled that one partner cannot . . . carry on another business in competition or rivalry with that of the firm . . . " *Id.* at 541. Since the common law affirmatively prohibited competition by partners against the firm, courts had no difficulty holding that such restraints were not "restraints of trade" that would make them unenforceable as against public policy. *Matthews* v. *Associated Press,* 136 N.Y. 333, 32 N.E. 981 (1893); *Dolph* v. *Troy Laundry Mach. Co.,* 28 F. 553 (N.D N.Y. 1886).

Shortly after enactment of the Sherman Act, its broad language and the Court's decision in *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897), apparently holding every agreement in restraint of trade to be within the ban of the Act, led to concern that Section 1 might prohibit restraints recognized as lawful at common law. The Court promptly addressed this concern in *United States* v. *Joint Traffic Ass'n,* 171 U.S. 505 (1898), where it found that restraints such as those inherent in the formation of business partnerships had "never . . . been regarded in the nature of a contract in restraint of trade or commerce." Accordingly, they are not contracts "in restraint of trade" reviewable under the Sherman Act. *Id.* at 567.

In the same year, Judge Taft also found that covenants by partners not to compete with each other or with the firm are not subject to the Sherman Act, but he did so through a different analysis. *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). Judge Taft reasoned that certain restraints were not covered by the Act's broad language because they were "ancillary restraints," *i.e.,*

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[34] The terms are synonymous for purposes of antitrust analysis. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 356 (1982); United States v. Morgan, 118 F. Supp. 621, 690 (S.D.N.Y. 1953). *See also* the decisions cited in nn. 7 and 9, *supra.*

restraints designed to effectuate the main purpose of a lawful common enterprise or contract. Such covenants are lawful when "necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract." *Id.* at 282.[35]

What remained for this Court's final determination was whether every restraint that did fall within the Sherman Act was automatically unlawful as suggested by the earlier *Trans-Missouri* and *Joint Traffic* decisions. That issue was resolved in *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911), in which the claimed illegal action was entirely unrelated to what the Court had previously held was not a "restraint of trade" at all or what Judge Taft had termed "ancillary restraints." *Standard Oil* thus established that "*non*ancillary restraints" when reasonable were lawful under Section 1 (*see* P. Areeda, *Antitrust Analysis* 320 (3d ed. 1980)), and its rule of reason test was adopted as the criterion for judging the legality of such nonancillary restraints.

The Court of Appeals' majority found that the NFL was a lawful and procompetitive enterprise, and the majority had "no reason to doubt" that the league location agreement was ancillary thereto. (23a.) However, in affirming the application of a *Standard Oil* rule of reason test to a covenant among the participants in the NFL enterprise, the majority misconceived both the ancillary restraints doctrine and the consequence of its ancillarity finding. Moreover, it required the ancillary location agreement to survive a "less restrictive alternative" analysis of questionable validity even as to agreements not involving co-venturers. (24a-25a.)[36] The basis for holding ancillary restraints lawful was summarized by Judge Taft as follows:

> " . . . when two men became partners in a business, although their union might reduce competition, this

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[35] As Justice Holmes later wrote in connection with a restraint ancillary to the sale of the goodwill of a going business, "there has been no intimation from anyone . . . that such a contract . . . would fall within the act." It "is not within the letter or spirit of the statute." Cincinnati Packet Co. v. Bay, 200 U.S. 179, 185 (1906).

[36] In Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977), the Court stated that a restraint may be reasonable even though it is

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> effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." *United States* v. *Addyston Pipe & Steel Co., supra,* 85 F. at 290.

Such a restraint must be "reasonable" in scope and serve the lawful purpose of the main contract.

Such requirements are not, however, synonymous with the rule of reason written into the Sherman Act by *Standard Oil.*[37] That standard cannot be applied by rote to covenants in a necessarily joint, lawful enterprise that establish the terms of each participant's role in the joint operation. As to such enterprises, the ancillarity doctrine conclusively recognizes that the participants must act jointly to achieve their valid main purpose (here, the joint production of NFL football); to the extent that the functioning of such a procompetitive enterprise entails agreements eliminating "competition" in the production of the joint product, those agreements are lawful as a matter of law if "reasonable" in scope and directed to achieving the lawful main purpose.

The majority below thus erred in testing the NFL's ancillary location agreement by the extent of its impact on "direct competition" between NFL members in the production of NFL football or by whether it promotes "free competition"

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"neither the least nor the most restrictive provision . . . ." Contrary to the suggestion of the Court of Appeals' majority (24a), Justice Rehnquist found serious fault with the Second Circuit's application of a less restrictive alternative standard in another NFL case. National Football League v. North American Soccer League, *supra,* 459 U.S. at 1079-80.

[37] As summarized in National Society of Professional Engineers v. United States, *supra,* 435 U.S. at 688, a case involving price restraints among competitors, that inquiry is required to focus "directly on the challenged restraint's impact on competitive conditions."

between a League member and the League partnership itself. (23a.) Such ancillary restraints among partners or participants in a common enterprise are lawful even when they limit or eliminate competition in the production of a joint product or service. As Judge Taft emphasized, the justification for such covenants lies in their creation of a lawful enterprise competitive with *other* firms and in their securing the participants' "entire effort in the common enterprise . . .." 85 F. at 290.

Despite Justice Rehnquist's recent recognition that the ancillary restraints doctrine may validate agreements among NFL members, *National Football League* v. *North American Soccer League, supra*, 459 U.S. at 1077-79, the majority below persisted in applying a conventional rule of reason analysis rather than recognizing that the NFL location agreement is simply not a restraint among business competitors within the ambit of Section 1. The approach of the majority, its passing reference to the *Addyston Pipe* decision, and its deprecating reference to the ancillary restraints concept as "inventive" and a "little used area of antitrust law" (22a) illustrate the thorough confusion among the federal courts as to the status of ancillary restraints under the Sherman Act.[38] The application of the ancillary restraints doctrine to professional sports league location agreements merits this Court's consideration and clarification.

IV. The Rule Of Reason Inquiry Was Both Unwarranted And Conducted In Conflict With Settled Requirements

Both the Court of Appeals' majority and the District Court attempted, by invoking the rule of reason, to alleviate the obvious logical discomfort they experienced in holding that the NFL members must, as a matter of law, be treated as economic competitors even though they are not. With paeans to its vaunted flexibility, they treated the rule of reason as a universal solvent capable of resolving all manner of questions under Section 1 of the Sherman Act. In doing so, they

[38] *See* M. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music, 66 Va. L. Rev. 879 (1980).

misapprehended the scope and standards of Section 1 as well as the traditional function of the court in deciding whether and how a claim should be submitted to a jury.

Section 1 does not impose an all-purpose antitrust regimen. *Copperweld* demonstrates that it was the obligation of the courts below to focus on whether the league location agreement constituted an arrangement among previously competing economic interests. 104 S.Ct. at 2741. In addition, as the dissenting judge below emphasized (36a-37a), if the league location agreement was to be subjected to rule of reason scrutiny, that review had to be conducted in accord with established Section 1 requirements. Neither of the courts below observed or satisfied these standards.

In *Copperweld,* this Court confirmed that a rule of reason evaluation requires "an inquiry into market power and market structure designed to assess the combination's actual effect." 104 S. Ct. at 2741.[39] An antitrust plaintiff must therefore prove a relevant product market before a court or jury can determine whether defendants have unlawful power over price, competition, or production. *United States* v. *E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 392-93 (1956). In the present case, the Court of Appeals' majority acknowledged that proof of "an impact on competition in a relevant market is an absolutely essential element of a rule of reason case . . . ." (15a.) Nonetheless, it sustained the finding that the NFL location agreement was unreasonable even while concluding that, due to a lapse by respondents' counsel, respondents *never* "placed before the jury" their critical evidence on relevant market. (17a.) The evidence omitted from respondents' presentation consisted of expert testimony that was to be devoted to proof of relevant market and the alleged impact of the NFL location agreement on competition. The majority expressed "surprise" that respondents' counsel "would neglect such important evidence." (*Id.*)

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[39] Such an inquiry examines the actual effects on "competitive conditions" (National Society of Professional Engineers v. United States, *supra,* 435 U.S. at 688) and on "market considerations" that provide "objective benchmarks." Continental TV, Inc. v. GTE Sylvania Inc., *supra,* 433 U.S. at 53 n.21.

Given respondents' failure to present their critical relevant market evidence, the dissenting judge found that the majority opinion flouted settled requirements of proof of market definition, and observed that the majority had strained to cover respondents' failure of proof by "restat[ing] the manner in which relevant market is to be proven in this Circuit. . . ." (37a.) He further challenged the majority's implication that a plaintiff "may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury." (*Id.*) The dissent concluded that "this lynchpin of [the majority's] 'rule of reasonableness' cannot pass as innocuously by long-standing precedent as the majority would have it." (*Id.*)

In recognition of respondents' failure to present their critical proof on the relevant market issues, the majority offered a novel, alternative justification for sustaining the jury's verdict. It first observed that in "the context of this case in particular, we believe that market evidence, while important, should not become an end in itself" because "the exceptional nature of the industry makes precise market definition especially difficult." (21a.) Without explaining or elaborating on this hypothesis, the majority concluded that the market definition issue was essentially resolved by the District Court's holding that the NFL location agreement is, as a matter of law, a conspiracy among economic competitors within Section 1. Observing that to "a large extent the market is determined by how one defines the entity," the majority concluded that if the NFL consists of "28 individual entities which compete with one another both on and off the field for the support" of consumers, then traditional requirements of proof of relevant market do not have to be satisfied. The majority found that "because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's [sic] market definitions." (*Id.*) In this manner, the Court of Appeals ruled that the District Court's decision on the conspiracy issue, which itself rested on now-overruled intra-enterprise conspiracy precedents, eliminated or diluted settled requirements of proof of relevant market in a rule of reason case.

The submission of the rule of reason issues by the trial court was in clear conflict with settled principle. That court applied the rule of reason as if the NFL members were competing automobile dealers or motion picture producers, requiring the members of the common enterprise to demonstrate that their challenged location agreement was more pro-competitive than anti-competitive within the league venture itself. The District Court repeatedly refused to instruct the jury to assess the *net* competitive effects of the League's location agreement by balancing the intra-NFL (*i.e.*, intrabrand) restraint with interbrand competitive benefits. *See Continental TV, Inc.* v. *GTE Sylvania Inc., supra,* 433 U.S. at 54-56.[40]

Lawful joint enterprises, such as professional sports leagues, serve to combine the actions of the participants rather than to promote business competition among them. And it is "the enforceability of [such] commercial agreements [that] enables competitive markets—indeed, a competitive economy—to function effectively." *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 688. When a joint enterprise is concededly lawful, it has thus been understood that the legality of agreements on basic matters such as the locations of the participants' joint operations turns on the venture's impact on competing businesses. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 168-69 (1964); *Arizona* v. *Maricopa County Medical Society, supra,* 457 U.S. at 355-57;

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[40] The trial court permitted the jury to treat the NFL alone as a relevant product market and to find the League's location agreement unlawful unless its procompetitive "benefits that . . . tend to promote competition in the industry" outweighed any restraining effects in the same "industry," *i.e.*, the League itself. 32 Tr.2d 7216. Nor would the court instruct the jury to balance the pro-competitive benefits in Northern California of the Raiders remaining in that area against any restraining effects in the Los Angeles area. These rulings reflected the trial court's conviction, expressed in its opinions, that the controlling issue was the potential for the NFL location agreement to suppress intra-NFL Raiders-Rams competition in the Los Angeles area. (59a; 66a; 84a & n.12.) Despite these trial rulings, the Court of Appeals' majority sustained the jury's verdict on the speculative hypothesis that the jury *could have* balanced the competitive benefits of the NFL agreement in an interbrand market against any restraining effect within the intra-NFL market—a hypothesis that the majority regarded as "critical" to its decision. (21a.)

see also United States v. *Columbia Steel Co.*, 334 U.S. 495, 521-24 (1948). It has never been thought that such a lawful venture can be treated as a relevant market unto itself—as the NFL was treated in this case—or that internal agreements are to be judged by rule of reason standards applicable to dealings among horizontal business competitors—as was done in this case.

The antitrust laws deal with a broad spectrum of business relationships—from horizontal competitor relationships and trade associations, through partially integrated enterprises and joint ventures of businesses independently producing separate products, to partnerships and unitary corporations. Although the courts below acknowledged that the NFL is an "exceptional" and "unique" integrated enterprise whose members are "not true competitors, nor can they be," they nonetheless applied the rule of reason to an internal NFL agreement on an unreasoned assumption that the League members stand at the horizontal competitor end of the spectrum.

The established requirements that the *court* decide questions of law and that jury verdicts must be held to some objective standards of proof were not respected in the submission of the present claims to the jury. Moreover, these requirements were essential in this case, where, in view of the admittedly "difficult" burden of applying antitrust rules developed in other contexts, a Los Angeles jury was effectively asked to decide whether it was reasonable to continue a successful professional football team in Oakland rather than have it operate in Los Angeles, where the case was tried. There can be little doubt how an Oakland jury would have answered that question. This is particularly so in view of the amorphous instructions in this case and the absence of any focus on the actual competitive effects of the challenged NFL decision. In these circumstances, preservation of the rule of law demands that legal questions, such as the scope of Section 1 of the Sherman Act, be resolved on the basis of economic substance and pertinent precedent. It also demands that settled rule of reason requirements be enforced rather than waived on the theory that "the exceptional nature of the industry" makes compliance with those requirements "especially difficult." (21a.)

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

APPENDIX A

United States Court of Appeals

NINTH CIRCUIT

Nos. 82-5572 to 82-5574, 82-5664, 82-5665, 83-5714, 83-5732 and 83-5938
Argued and Submitted April 7, 1983
Decided Feb. 28, 1984

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants/Cross-Defendants-Appellants/Cross-Appellees.

Before:

ANDERSON and NELSON,
Circuit Judges,

and WILLIAMS,
*District Judge.**

Appeals from the United States District Court for the Central District of California.

J. BLAINE ANDERSON, *Circuit Judge:*

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F.Supp. 154 (C.D.Cal.1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the

rule to require only three-quarters approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F.Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the

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[1] Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981), the court concluded the League was not a "single entity." Vol. 12 Clerk's Record # 931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was instructed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record # 2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574) and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

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[2] Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that

(footnote continues)

II. SHERMAN ACT § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States* v. *Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed. 48, 58 (1982).

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65, 31 S.Ct. at 517. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine

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(footnote continued)

judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed.R.Civ.P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion; its denial of the motion is not an appealable order. *Smith* v. *Lujan*, 588 F.2d 1304, 1307 (9th Cir.1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

whether that restraint promotes or restrains competition. *See Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683, 687 (1918).

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. ***Single Entity***

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question. A directed verdict may be granted pursuant to Fed.R.Civ.P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary* v. *Nat'l Distillers and Chemical Corp.,* 505 F.2d 695, 696 (9th Cir.1974). Our review is *de novo. Santa*

Clara Valley Distributing Co. v. *Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir.1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2905, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction—yet courts have held the League violated § 1 in other areas. 519 F.Supp. at 583. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated § 1. Other courts have held the League rules governing player contracts violate § 1 of

the Sherman Act. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir.1976); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 536 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1985-1986, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of § 1. While these cases and others have been the subject of some criticism, *see, e.g.*, M.

Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems* v. *North American Philips Corp.,* 699 F.2d 965, 980 (9th Cir.1983); *see Thomsen* v. *Western Electric Co.,* 680 F.2d 1263, 1266 (9th Cir.), *cert. denied,* 459 U.S. 991, 103 S.Ct. 348, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc.* v. *Summa Corp.,* 610 F.2d 614, 617 (9th Cir.1979), *cert. denied,* 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press v. United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 65 S.Ct. at 1427, 89 L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc.* v. *Columbia Broadcast System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1

(1979);[3] *see also Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

The case of *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 87 S.Ct. at 1849-1850, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to *Sealy*).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution,

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[3] On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc.* v. *American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir.1980), *cert. denied*, 450 U.S. 970, 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir.1983).

which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 87 S.Ct. at 1850, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 at 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 Yale L.J. 775, 796-801 (1965).

B. *Rule of Reason*

In *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918), Justice

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[4] One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966 (C.D.Cal.1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of § 1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model,* 82 Mich.L.Rev. 1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals* v. *Abbott Laboratories,* _____U.S._____, _____-_____, 103 S.Ct. 1011, 1016-17, 74 L.Ed.2d 882, 890-91 (1983); *see also United States* v. *Cooper Corp.,* 312 U.S. 600, 606, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.'" *Cascade Cabinet,* 710 F.2d at 1373 (quoting *Northrop Corp* v. *McDonnell Douglas Corp.,* 705 F.2d 1030, 1050 (9th Cir.1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet,* 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan* v. *Burroughs Corp.,* 611 F.2d 286, 290 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.,* 699 F.2d 1292, 1296 (9th Cir.1983).

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element—the 28 member

clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan,* 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.; see Aydin Corp.* v. *Loral Corp.,* 718 F.2d 897, 901 (9th Cir.1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g., North American Soccer League,* 670 F.2d 1249; *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *National Football League,* 543 F.2d 606 (8th Cir.1976), *cert. dismissed,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). On the one

hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700, 705 (1927); *United States* v. *Topco Associates*, 405 U.S. at 611, 92 S.Ct. at 1135, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League*, 670 F.2d at 1258-1259; *see Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir.1983). Instead, we must examine Rule 4.3 to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility,

weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed. 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan*, 611 F.2d at 291; *see also Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 268-269 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.*, 433 U.S. at 53 n. 21, 97 S.Ct. at 2559 n. 21, 53 L.Ed.2d at 582, n. 21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take

> significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see 3 J. von Kalinowski, *Antitrust Laws and Trade Regulations*, § 8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan*, 611 F.2d at 292 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers—over 100 million people—that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2

billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one

another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams is presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definitions. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. The History and Purpose of Rule 4.3

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however,

the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan*, 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason, supra* at 799-800. Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798; *see Addyston Pipe*, 85 F. at 281-82; *Lektro-Vend*, 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act,* 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.*, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith* v. *Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL argues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel,* 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of

major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League,* 459 U.S. 1074, 1080, 103 S.Ct. 499, 502, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend,* 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc.* v. *U & I Inc.,* 681 F.2d 1203, 1228-30 (9th Cir.1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 303 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of

Rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 303. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States* v. *Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments

ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568, 581, n. 19 (1977). To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56, 97 S.Ct. at 2558-2560. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities,

regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws,* 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.; see Silver* v. *New York Stock Exchange* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under § 1); *cf. Deesen* v. *Professional Golfers Ass'n,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligiblity of players for tournaments, there was not a § 1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders

respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed.R.Civ.P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell* v. *Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir.1982); *Van Cleef* v. *Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir.1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id; Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir.1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 466 n. 13 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast Distribution Co., Inc.* v. *Mead Corp.*, 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 183 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member

clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 32 T.R.2d at 7216-7218. While not framed in the terms and detail requested by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. E.g., 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under § 4 of the Clayton Act. *See Brunswick* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, 712 (1977); *see also Kapp* v. *National Football League,* 586 F.2d 644, 648 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat,* 429 U.S. at 491, 97 S.Ct. at 698, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of

entertainment (interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers:*

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 98 S.Ct. at 1365, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3. 32 T.R.2d at 7216. The NFL was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. § 1404(a). In relevant portion, § 1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have best been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice." *Murphy* v. *Florida,* 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589, 597 (1975); *see Smith* v. *Phillips,* 455 U.S. 209, 215-217, 102 S.Ct. 940, 944-945, 71 L.Ed.2d 78, 85-86 (1982); *Chandler* v. *Florida,* 449 U.S. 560, 581-582, 101 S.Ct. 802, 813, 66 L.Ed.2d 740, 756 (1981); *United States* v. *Bailleaux,* 685 F.2d 1105, 1109 (9th Cir.1982); *United States* v. *Brown,* 540 F.2d 364, 379 (8th Cir.1976). Neither the pretrial publicity nor the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert* v. *Florida,* 432 U.S. 282, 302-303, 97 S.Ct. 2290, 3202-3203, 53 L.Ed.2d 344, 361-362 (1977); *Murphy* v. *Florida,* 421 U.S. at 800-802, 95 S.Ct. at 2036-2037, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy,* 421 U.S. at 798, 95 S.Ct. at 2035, 44 L.Ed.2d at 594. No such

showing has been made out here. The trial court used a very thorough voir dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including administering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R.2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow* v. *Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), and *Tumey* v. *Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has a pecuniary interest in the outcome." *Withrow,* 421 U.S. at 47, 95 S.Ct. at 1464, 43 L.Ed.2d at 728. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.,* 389 F.Supp. 568, 571 (E.D.Va.1975); *cf. United States* v. *Brown* 540 F.2d 364, 379 (8th Cir.1976) (there was no basis to strike

jurors for cause merely on showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the basis of "hometown" interests. We decline to engage in such speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc.* v. *U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir.1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is

AFFIRMED.

SPENCER WILLIAMS, District Judge, Sitting by Designation, concurring in part, dissenting in part.

INTRODUCTION:

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of § 1 of the Sherman Act, 15 U.S.C. § 1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned, and not subject to the strictures of Sherman Act § 1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, § 1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. *The Relevant History of the N.F.L.*

The N.F.L. was established early in this century as an unincorporated business association, the members of which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated, and although members of the N.F.L. compete on the playing field, they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member clubs' activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (*e.g.*, an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the above-mentioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a single franchise are subordinated to specified consent of the other clubs. For example, establishment of a new franchise is submitted for approval to all N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have

[1] Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. *The History of the Present Action.*

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury.[2]

C. *The Various Appeals Pending before this Court.*

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat conflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that

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[2] See Majority Opinion at 1392-1394, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klein was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' suppression of a key document, the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act § 1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was

submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, § 1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had the capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not . . . sufficient (evidence) to preclude the jury from finding otherwise." *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.1982) (*per curiam*).

In *Murray* v. *Toyota Motor Distributors, Inc., supra,* the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (wa)s *not* "compelling", since it should have been submitted to the jury once there was simple "persuasive" evidence on either side. *C.f., Majority Opinion* at 1387.

I agree however with the district court that there were no material issues of disputed fact as to whether the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems* v. *North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th Cir.1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal

organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act § 1 is consumer-dictated supply, unfettered by conspiracy between competing producers,—and, I submit that it is—extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act § 1, as it is to police conspiracies between economic competitive entities. Nonetheless, all economic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of § 1, or competitive entities injured as a result of monopoly, or attempted monopoly, in an industry under Sherman Act § 2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public perception and economic interdependency rendering otherwise independent member clubs subordinate to the integrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra,* is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single entity. In *General Business Systems, supra,* at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly at either of these extremes"; *i.e.,* "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold

themselves out to the public as competing organizations, and set policy independently . . ." (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case—a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F.Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autonomous—albeit tightly constrained by league guidelines on eligibility, medical and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

As the majority opinion correctly points out:

> this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . . , the N.F.L. teams *are not true competitors nor can they be.*

Majority opinion, at 1391, *emphasis added.* Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition—the *sine qua non* of the Sherman Act § 1—by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League* v. *N.F.L.,* 670 F.2d 1249, 1251 (2d Cir.1982); *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1179 (D.C.Cir.1978); *Mackey* v. *N.F.L.,* 543 F.2d 606, 619 (8th Cir.1976); *Mid-South Grizzlies* v. *N.F.L.,* 550 F.Supp. 558, 562 (E.D.Pa.1982); *U.S.* v. *N.F.L.,* 116 F.Supp. 319, 323-324 (E.D.Pa.1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions

arising in professional hockey and basketball, realized that it is nonsensical to emphasize intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966, 969-971 (C.D.Cal.1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin* v. *National Basketball Association,* 385 F.Supp. 149, 150, 152 (S.D.N.Y.1974) ("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be an "unincorporated joint venture". *N.A.S.L.* v. *N.F.L., supra* at 1257, (2d Cir.), *cert. denied,* ____U.S.____, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the N.F.L.; *i.e.,* a "joint employer" for labor relations purposes, upon an examination of its "N.F.L.-like" characteristics. *N.A.S.L.* v. *N.L.R.B.,* 613 F.2d 1379, 1382 (5th Cir.1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act § 1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc.* v. *Southwestern P.A., etc.,* 670 F.2d 421, 429, n. 11 (3d Cir.1982), citing *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1178 (D.C.Cir.1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this "downstream output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act § 1, by restricting any economically independent entities from supplying goods or services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant identities apart from the collective N.F.L. for the limited purposes of their

extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, § 5.11 (1978), 687, 692 esp. n. 86. Thus, § 1 can and should protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intraleague rule.

This is the critical distinction between cases which invalidate various intraleague rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player draft held to violate § 1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra,* (only relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1061 (C.D.Cal.1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman* v. *World Hockey Association*, 439 F.Supp. 1315, 1322 (D.Conn.1977); *Kapp* v. *National Football League*, 390 F.Supp. 73, 81-82 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979) ("(a) conceivable effect of th(e "ransom" or "Rozelle" rule) would be to *perpetually* restrain a player from pursuing his occupation among the clubs

of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint . . ."); *cf.*, *North American Soccer League, et al.* v. *N.F.L., et al., supra,* (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act § 1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs—including the Raiders—which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mecha-

nism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale. *Broadcast Music, Inc.* v. *Columbia Broadcast Systems, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrelevant on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even among sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrelevant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administered allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of non-severable and indistinct product—professional football. See generally, Quirk, *An Economic Analysis of Team Movements in Professional Sports,* 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951)), mattresses (*U.S.* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967)), or groceries (*U.S.* v. *Topco Associates,* 405 U.S. 596, 598, 92 S.Ct. 1126, 1128, 31 L.Ed.2d 515 (1972)), because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have

independent value" (519 F.Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al.* v. *United States,* 326 U.S. 1, 18, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act § 1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater exploitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition would portend for the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectually interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling

that the N.F.L. structure is itself *per se* invalid under the Sherman Act § 1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. See *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147 (10th Cir.1983) *cert. granted*, ____U.S.____, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983).

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework within which courts scrutinize agreements under Sherman Act § 1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra; Levin, supra.* Rule 4.3 is no more a restraint on trade in professional football for Sherman Act § 1 purposes, than is an intra-corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet business. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman* v. *N.F.L.*, 402

F.Supp. 754 (D.Minn.1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972) (Sherman Act § 2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act § 2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act § 2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich* v. *N.F.L.*, 352 U.S. 445, 453-54, 77 S.Ct. 390, 394-95, 1 L.Ed.2d 456 (1957) and particularly *American Football League* v. *N.F.L.*, 323 F.2d 124, 131 (4th Cir.1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under § 2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under § 2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be "upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals* v. *National Hockey League*, 379 F.Supp. 966, 971-72 (C.D.Cal.1974). The Coliseum may be able to mount a successful challenge to Rule 4.3 upon a § 2 theory, but that issue is not presently before this Court.

As always, § 1 remains a viable theory under which those "upstream" aspects of member clubs' operations—those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities—could be challenged. An oft-tried, and frequently successful example of

this theory has been the player draft litigation; the distinction between instances in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act § 1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L.* v. *N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra;* and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated [sic] financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and

Raiders. I would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION:

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate § 1 of the Sherman Act. The judgment of the district court should be reversed and judgment entered for the N.F.L. and its codefendants.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

No. 78-3523-HP—July 24, 1981

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

Memorandum and Order granting directed verdict for plaintiff and cross-complainant on single entity issue

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PREGERSON, *Circuit Judge:*

This matter is before the court on cross-motions filed, pursuant to Fed.R.Civ.P. 50(a), by the plaintiff Los Angeles Memorial Coliseum Commission, the cross-claimant Oakland Raiders, and the NFL defendants, seeking entry of a directed verdict with respect to the defendants' contention that the NFL is a single economic entity for purposes of this lawsuit and hence cannot as a matter of law have violated section 1 of the Sherman Act. Having studied the parties' briefs and heard the oral argument of counsel on July 24, 1981, the court concludes that the motions of the Coliseum Commission and the Raiders should be granted and that of the NFL denied.

The Los Angeles Memorial Coliseum Commission originally moved before trial for partial summary judgment on the single entity issue. The court denied that motion because it appeared that proper resolution of the issue could well depend on the factual evidence adduced at the trial. Because summary judgment is proper only when it is quite clear what the truth is, *Poller* v. *CBS,* 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), a district court may properly deny summary judgment even where it would be technically proper, so that the case may be fully developed at trial. *Roberts* v. *Browning,* 610 F.2d 528, 536 (8th Cir. 1979).

That development has now occurred, and it is apparent that there are no genuine issues of material fact concerning the single entity question. The parties' disagreement concerns the legal effect to be given to the undisputed facts. The question is a close one, and the court has benefitted greatly from the briefs and oral arguments of the parties. Careful consideration of the legal arguments put forward by the Coliseum and by the NFL have convinced this court that the undisputed facts preclude treating the NFL as a single entity for purposes of this lawsuit.

On its face, the NFL certainly appears to be an association of separate business entities rather than one single enterprise. The twenty-eight member clubs are separate legal entities—some corporations, some partnerships, and some sole proprietorships. No two clubs have a common owner. The clubs share a large part, but not all, of their revenues. They do not share their profits or losses. They are managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, and the terms of their stadium leases. They do not exchange or share their accounting books and records.

The Supreme Court has consistently rejected the single-entity argument in circumstances more favorable to that argument than those presented in this case. Firms with a high degree of common ownership have been held separate for Sherman Act purposes. *See Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 597-98, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,*

Inc., 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947). Indeed, even a parent corporation and its subsidiary have been held separate entities in a Sherman Act context: since they had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 982 (1968).

The Ninth Circuit has taken a similarly unreceptive view of single-entity claims, as demonstrated by *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). The defendants there were two newspaper-publishing corporations, one a wholly-owned subsidiary of the other. The Ninth Circuit was reluctant to characterize these firms as a single entity for Sherman Act purposes, stating only (in dictum) that they were "[a]rguably" one enterprise. Yet not only were the two firms parent and subsidiary, but one individual had control of the parent, was president of both corporations, and published all of both companies' newspapers. Moreover, the firms shared many key personnel, their newspapers exhibited numerous common features, and the two companies did not compete. If all these features together were insufficient to establish a single enterprise, it is difficult to see how the NFL can constitute a single entity when it possesses *none* of those features.[1]

The League argues, however, that the unitary nature of the product it creates—NFL football—necessarily implies that it is a single entity. "[T]he economic substance is that of a single firm selling a single product involving a necessary contribution from each member." *NFL Opposition* at 3. This argument suffers from several defects.

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[1] The NFL is not the "parent" of any league member, nor do any two clubs have a common owner. The clubs do not share key operational personnel. And the NFL itself has conceded that "the existence of actual or potential inter-club competition in certain areas is not disputed." *NFL's Opposition to Motion for Partial Summary Judgment*, filed February 20, 1981 [hereinafter *NFL Opposition*], at 29.

In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978).[2]

Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. The clearest instance is *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where Associated Press bylaws aimed at preventing competitors of existing members from joining the association were held unlawful. Associated Press was an incorporated membership association whose members were newspapers. It gathered and distrubuted "news which [its] member papers cannot collect single-handed, and which requires their pooled resources." *Id.* at 26 (Frankfurter, J., concurring). This was a product or service distinct from that of the member publishers, and one requiring the cooperation of all the members, none of whom

[2] The NFL argues that the player cases are distinguishable because they challenged NFL conduct in a different market—the market for player services, rather than the market in which NFL football is sold. "In the player market . . . each club had the capacity to employ players without necessarily involving other clubs in such contracts." *NFL Opposition* at 39. The distinction is unconvincing. Each club likewise has the capacity to lease a stadium without involving the other clubs in its contract. Of course, the other clubs will be "involved" in the sense that they will have to play in the leased stadium. But they are similarly "involved" when one club employs a player in the sense that they will have to play against that player. In short, players no less than stadiums are a factor in producing professional football, and if the nature of professional football makes its producer, the NFL, a single entity, that conclusion would apply as much in the player market as in the stadium market.

had the facilities or resources to produce AP's stream of worldwide news. Yet the Court had no trouble finding AP's anticompetitive bylaws a restraint of trade.[3] Likewise, in *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 365, 83 S.Ct. 1246, 1261, 10 L.Ed.2d 389 (1963), the Court held that the Exchange had violated section 1 of the Sherman Act. Yet the Exchange "perform[ed] an important function" by "serv[ing] . . . as an indispensable mechanism through which corporate securities can be bought and sold"—a function that none of its individual broker-members could perform on its own. *Id.* at 349, 83 S.Ct. at 1253.[4]

A third problem with the NFL's argument is that it seems to rest on a false premise—that the individual NFL clubs are not separate business entities whose products have an independent value. The League may be correct when it characterizes its member clubs as "[e]ntities which have capacity to be competitors *only* when acting jointly with members of a common enterprise." *NFL Brief on Cross-Motions for Directed Verdict re Single Entity,* filed July 23, 1981 [hereinafter *NFL Brief*], at 21. But this means only that each club must act jointly with *some* other teams in *some* cooperative framework in

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[3] *See also United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 (1941), affirming the conviction of four corporations for violating section 1 of the Sherman Act. The defendants were GM, its sales and financing subsidiaries GMSC and GMAC, and a subsidiary of GMAC. The defendants had argued that they all directed their operations "toward one end, the manufacture and sale of General Motors automobiles," *id.* at 384, and that GMAC and its subsidiary were thus merely parts of one common enterprise engaged in the unitary business of making and selling GM cars. The court rejected this defense. *Id.* at 404.

[4] The NFL would distinguish *Associated Press* and *Silver* as involving "organizations made up of firms, each of which were self-contained competitors separate and independent of their membership in the umbrella cooperative," unlike the NFL's member clubs. *NFL Brief* at 22. This is not, in the court's view, a "distinction of substance" as the NFL believes. *Id.* at 23. As discussed below, any individual NFL team could, in theory, withdraw from the NFL and join or found a new league. A team could even withdraw and try to present non-league exhibition games, as the Harlem Globetrotters do. Such a venture might be almost certain to fail—but then so would a stock broker who decided to quit the New York Stock Exchange and operate without a seat on any exchange.

order to produce football games. It does not show that each club can produce football games only as an *NFL* member. Indeed, many of the current NFL members—including plaintiff Raiders—previously operated as members of a rival football league. There is no conceptual reason why any NFL team could not decide to pull out and join a new league.[5] Thus, although the Raiders can create a product only in collaboration with other teams, it does not follow that they "have no capacity to be competitors separate and apart from their membership in the National Football League." *NFL Brief* at 29. Indeed, sports fans quite often wish to spend their money on the games of a particular team, not simply on "NFL football," "NBA basketball," or the like.[6]

Besides stressing its allegedly unitary product, the NFL relies principally on *North American Soccer League* v. *NFL*, 505 F.Supp. 659 (S.D.N.Y.1980), and *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974). But these cases do not help the League in this lawsuit, for they arose in far different contexts. The *North American Soccer League* case arose in the very different setting of a clash between two separate professional sports leagues, and Judge Haight specifically noted that the single entity defense "fails where two member teams would compete in the

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[5] The NFL might insist that although an individual club could secede from the League and continue to take part in producing football games, it would not be producing *NFL football*. But that is a mere tautology and in no way shows that the League's product has a special unitary quality. Even the most blatant coalition of competing enterprises, charged with a Sherman Act violation, could argue that no other entity except the coalition itself could produce a "coalition product": this would not mean that every such coalition must be considered a single business entity.

[6] For this reason, the NFL's analogy with *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184 (3d Cir.1976), is unconvincing. *NFL Brief* at 19-20. That case involved a retailer, Hempfield, who operated the grocery departments of a number of defendant's K-Mart stores. The court found an absence of competition, since from a customer's viewpoint, "whether the . . . item was purchased from Kresge or from Hempfield, it was as if the item had been offered for sale by Kresge alone, but at two different locations in its K-Mart establishment." 544 F.2d at 1193. In our case, by contrast, few football fans would regard a Raiders game and, say, a Jets game as merely "NFL football" dispensed at different locations.

same geographical area for sports' fans dollars, and league restraint of that competition damages a stadium operator"—the precise situation alleged here. 505 F.Supp. at 677. *San Francisco Seals* turned on a finding that denial of the Seals's proposed move to Vancouver had no anticompetitive effect. That finding cannot automatically be transferred to this case, because the Seals, unlike the Raiders here, were not being prevented from moving into another team's home territory.

For the foregoing reasons, the court concludes that the NFL's member teams should be treated as separate business enterprises for purposes of this lawsuit, rather than as components of a single business entity. The NFL's arguments are by no means without force if marshalled in an attempt to demonstrate that the competitive activity of the NFL's teams presupposes a degree of mutual cooperation perhaps unique to the world of professional sports. But such unique features are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense.

THEREFORE, IT IS ORDERED that the motions of the Coliseum Commission and the Raiders for directed verdict on the single entity issue be granted, and the NFL's motion be denied.

The Clerk of the Court is directed to serve copies of this order by United States mail upon the attorneys of record appearing for the parties herein.

APPENDIX C

APPENDIX C [1]

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

Civ. No. 78-3523-HP—Feb. 21, 1980

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE *et al.*,
Defendants.

Memorandum and Order granting plaintiff's motion for a preliminary injunction

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PREGERSON, *Circuit Judge*, sitting by designation.

This matter is before the court on plaintiff's motion for a preliminary injunction, which, according to plaintiff's moving papers, "could equally well be viewed as seeking summary judgment." After considering the pleadings, the memoranda of law, the affidavits, and the oral argument of counsel, the court has determined that the motion for a preliminary injunction should be granted. Insofar as the motion seeks summary judgment, however, summary judgment is denied.

In this action, the Los Angeles Memorial Coliseum Commission ("Coliseum"), seeks an injunction restraining the National Football League ("NFL") from invoking § 4.3 of the NFL's Constitution and Bylaws in connection with the contemplated transfer of the Oakland Raiders Football Club to the Los Angeles Memorial Coliseum. Section 4.3 requires an affirmative vote of three-fourths of the NFL team owners before a member club may transfer the location of its home

[1] This order was reversed on other grounds by the Court of Appeals. 634 F.2d 1197 (9th Cir. 1980).

games from one city to another.[2] The Coliseum claims that § 4.3 constitutes a division of territories among competitors, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, the Coliseum seeks to enjoin the NFL from invoking the three-fourths vote requirement on the ground that enforcement of § 4.3 threatens to block the Coliseum and the Oakland Raiders from finalizing an agreement that would bring the Raiders to Los Angeles as the Coliseum's new NFL tenant.

In earlier proceedings on the motion to dismiss the complaint, this court found that plaintiff had not adequately alleged standing to bring the action. In an order dismissing the complaint with leave to amend, *Los Angeles Memorial Coliseum Commission* v. *N. F. L.*, 468 F.Supp. 154 (C.D. Cal. 1979), this court further stated that, assuming plaintiff could successfully amend the complaint to plead the prerequisites for standing, the legality of § 4.3 must be determined under a rule of reason analysis, because its mere existence did not constitute a per se violation of the Sherman Act.

The court finds that plaintiff has now met the standing prerequisites set out in the court's prior order, 468 F.Supp. at 162. Thus, plaintiff has alleged the following:

1) that it is reasonably likely that an existing NFL team is seriously interested in moving to Los Angeles;

2) that it is reasonably likely that a transfer team would decide to play its home games in the Coliseum;

3) that it is reasonably likely that a transfer team and the Coliseum would be able to agree on lease terms; and

4) that is is reasonably likely that pursuant to § 4.3, the NFL members will not approve the transfer of an existing team to Los Angeles and the Coliseum before the 1980-81 season.

Turning to the question of plaintiff's entitlement to an injunction under § 16 of the Clayton Act, the court notes that

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[2] Section 4.3 provides: "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League."

§ 16 provides for injunctive relief against threatened loss by a violation of the antitrust laws "when and under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity," 15 U.S.C. § 26. Therefore, before injunctive relief may be granted under § 16, the court must first determine whether plaintiffs have satisfied either of the two traditional equitable standards applicable to the grant or denial of a preliminary injunction.

I. PRELIMINARY INJUNCTION STANDARDS

In *William Inglis & Sons Baking Company* v. *I. T. T. Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1976), the Ninth Circuit set out two possible bases on which a preliminary injunction may be granted. The first requires the moving party to show (1) probable success on the merits, and (2) the possibility of irreparable injury. The second, or alternative, preliminary injunction standard requires the moving party to demonstrate only that (1) the suit raises "serious" questions of law, and (2) that the balance of hardships tips sharply in its favor. *See also Miss Universe, Inc.* v. *Flesher*, 605 F.2d 1130 (9th Cir. 1979).

Under the second standard, plaintiff is required to show that the balance of hardships tips sharply in its favor. Such a showing seems unlikely in this case since the alleged injury to the Coliseum in the absence of an injunction, i. e., lost revenues due to its failure to acquire an NFL team, is nearly evenly balanced by the financial injury that granting the injunction could cause to a third party, the Oakland Coliseum, due to its possible loss of the Raiders. This conclusion prevents the application of the alternative standard but does not end the court's inquiry. Under the first standard, plaintiff has demonstrated the requisite possibility of irreparable injury. This is so because the managing partner of the Raiders has indicated both that his club desires to play its home games in Los Angeles, and that the only significant obstacle to reaching an agreement with the Coliseum is the possible invocation of § 4.3. Having concluded that the possibility of irreparable injury

exists, what remains, under the first standard, is for the court to determine whether plaintiff has shown a probability or a likelihood of success on the merits of its antitrust claim.

This court has already ruled that the legality of § 4.3 must be tested under the rule of reason. *Los Angeles Memorial Coliseum, supra,* 468 F.Supp. at 164-166. Under the rule of reason, "the court must balance the anticompetitive evils of the challenged restraints against their procompetitive virtues to determine whether the restraints are reasonable and thus legal." *Id.* at 167. Thus, to determine whether plaintiff has shown that it is likely to succeed on the merits, the court, on the facts presently before it, must undertake a preliminary rule of reason analysis by weighing the procompetitive and anticompetitive effects of § 4.3. If the anticompetitive effects appear to outweigh the procompetitive justifications, a preliminary injunction in plaintiff's favor would be in order.

II. PRELIMINARY RULE OF REASON ANALYSIS

The court's previous order set out the following as a procompetitive virtue of § 4.3:

> In order for professional football games to be played (and thus for economic competition to exist), the teams . . . must agree on *where* the games are to be played. Games, traditionally, are played where one of the participating teams has its home city. Therefore, an agreement on where the games are to be played necessarily involves an agreement on the location of each team's home city. [Section] . . . 4.3 provide[s] a mechanism whereby the NFL teams can agree on where each transfer . . . team is to be located—to that extent [that section is an agreement] on where games are to be played.

468 F.Supp. at 166. It was this apparent procompetitive virtue which provided the court with the following rationale for

adopting the rule of reason, rather than a per se rule, as the appropriate mode by which to evaluate the lawfulness of § 4.3:

> Because these agreements promote competition to some extent, it cannot be said that they have a 'pernicious effect on competition' or that they lack 'any redeeming virtue.' *Northern Pacific R. Co.* [v. *United States,*], 356 U.S. [1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)] at 5, 78 S.Ct. at 518.

468 F.Supp. at 166.

In addition to functioning as a device to determine the sites where games are to be played, defendants have asserted that § 4.3 has certain other procompetitive aspects. The NFL argues, for example, that the rule "protects the value of each team's enterprise," and that it "provides the necessary incentive to develop and nurture such businesses." *See* NFL Brief in Opposition to Motion for Preliminary Injunction, 12-17. These justifications, however, seem to advance an argument that § 4.3 is procompetitive because it helps stabilize the professional football industry, by increasing profits and preserving the value of team franchises.

According to a recent opinion of the Supreme Court:

> The early cases . . . foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition . . . That kind of argument is properly addressed to Congress and may justify an exemption from the statute for special industries, but it is not permitted by the Rule of Reason.

National Society of Professional Engineers v. *United States,* 435 U.S. 679, 690, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 (1978) (citations and footnote omitted). Thus, although "profit maximization is certainly in the best interests of the football industry, it is not, by itself, a procompetitive justification and, under *Professional Engineers* [*Id.* at 692, 98 S.Ct. at 1365], may not be factored into the reasonableness determination." *Los Angeles Memorial Coliseum, supra,* 468 F.Supp. at 167.

The primary anticompetitive aspect of § 4.3 is fairly self-evident: a rule which inhibits teams from transferring their home locations may act to prevent an existing team from transferring into the Los Angeles-Orange County area to compete with a team already there for dollars in the pockets of sports fans. In addition, a rule which hinders a new NFL team from moving into Los Angeles would inhibit local competition for football players, coaches, and other personnel. The extent to which a League's voting requirements restrict transfers of home locations from one city to another is, of course, dependent on the size of the vote required to approve a transfer. If an NFL team, desiring to play its home games in Los Angeles, must first win the unanimous approval of all teams in the League,[3] then its intentions obviously could be frustrated by the negative vote of a single team. Lower percentage vote requirements would, of course, constitute less of an obstacle to individual team decision-making, and would still provide a mechanism for determining the locations at which games are to be played.

This court's previous order noted that the mere fact that "some sort of agreement is needed to determine where each team is to have its home city . . . does not necessarily mean that it is reasonable and thus legal for the agreement to contain a three-fourths vote requirement." 468 F.Supp. at 166.

In a rule of reason case, the Ninth Circuit quoted with approval the following language from a Supreme Court decision:

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is *fairly necessary,* in the circumstances of the particular case . . ." *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U.S. 373, 406, 31 S.Ct. 376, 384, 55 L.Ed. 502 (1911).

Anderson v. *American Automobile Association,* 454 F.2d 1240, 1246 (9th Cir. 1972) (emphasis added). In other words,

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[3] When the present suit was first filed, § 4.3 required a unanimous vote to approve transfers. *See* Plaintiff's Supplemental Brief, Appendix A.

although defendants can show that the rule in question has sufficient procompetitive merit to justify examining its lawfulness under the rule of reason analysis, a court may not uphold the restraint unless, with respect to the public and the parties, the restraint is limited to what is fairly necessary to obviate the concerns that brought it into being. If the restraint is more restrictive than "fairly necessary, in the circumstances of the particular case" it will be considered unreasonable, and thus in violation of § 1 of the Sherman Act.

In this case, the rule of reason analysis applies because some agreement among the teams is essential to permit the formation of an organized league. In determining whether the agreement or rule in question is reasonable, however, the court should assess the rule's ability to accommodate two competing interests: (1) the interests of the NFL in binding member teams to an agreement on where games will be played, and (2) the interest of the individual team in establishing its home location in whichever city it selects. A three-fourths vote requirement, by which eight out of twenty-eight teams can block the transfer of another team, appears to more than meet the NFL's interest, while giving marginal support to the interest of the individual team desiring to relocate. A majority vote requirement, on the other hand, would seem to provide a fairer accommodation of league and individual team interests. Furthermore, a majority vote requirement, in a matter affecting the public interest, is more consistent with the traditions of our democratic society.

Although the court considers the question to be close, the balance on the rule of reason scale appears to tip slightly in favor of plaintiff. Plaintiff has therefore shown sufficient likelihood of success on the merits to be entitled to a preliminary injunction.

The record is insufficient, however, to permit the court to grant plaintiff summary judgment. As was made clear during the hearing on the preliminary injunction motion, *see* Reporter's Transcript at 76-77, several material facts remain in dispute. Further evidence as to the business of professional football, the purpose, effect, nature and history of § 4.3, the

reason why the rule was imposed, and plaintiff's threatened injury must still be added to the record before the court will be in a position to rule on a motion for summary judgment under Fed.R.Civ.P. 56.

III. THE INJUNCTION

IT IS HEREBY ORDERED that defendants are enjoined, pending the determination of this action, from enforcing § 4.3 of the National Football League's Constitution and Bylaws, as currently written, to prevent the Oakland Raiders Football Team, or any other NFL football team, from transferring the location of its home games to the Los Angeles Memorial Coliseum. It is, of course, understood that such an injunction, which merely restrains the invocation of § 4.3, does not force or require any team to take any action against its will.

IT IS FURTHER ORDERED that this Memorandum and Order shall constitute the court's findings of fact and conclusions of law as authorized by Fed.R.Civ.P. 52.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties appearing herein.

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

No. 78-3523-HP—Feb. 28. 1979
As Amended May 16, 1979

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE et al.,
Defendants.

Memorandum and order granting defendants' motions to dismiss with leave to amend and denying plaintiff's motion for partial summary judgment

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PREGERSON, *District Judge.*

This case requires the court to examine certain provisions of the constitution and by-laws of a professional sports league in the context of the nation's antitrust laws. Plaintiff, the Los Angeles Memorial Coliseum Commission ("Coliseum") contends that the National Football League ("NFL") and its twenty-eight member teams stand in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Specifically, the Coliseum challenges the validity of sections 3.1 and 4.3 of the NFL's Constitution and By-laws, which require an affirmative vote of three-fourths of the team owners before a member club may transfer its franchise from one city to another or before a new member club may be admitted into the NFL.[1] The

[1] Section 3.1(b) provides: "The admission of a new member club . . . shall require the affirmative vote of three-fourths of the existing member clubs of the League."

Section 4.3 provides: "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League."

Coliseum seeks to enjoin defendants, under § 16 of the Clayton Act, 15 U.S.C. § 26, from enforcing sections 3.1 and 4.3.

The NFL, an unincorporated association, and its twenty-eight member teams are engaged in the business of producing public entertainment in the form of professional football games. The NFL is the only "major league" professional football organization operating in the United States. Each team, which is separately owned, is located in a particular city and plays all of its "home games" in that city. Though the teams do not pool profits or generally share expenses,[2] they do act concertedly by cooperating with each other in a number of significant ways. Pursuant to the NFL's Constitution and By-laws, this cooperation includes promulgating uniform playing rules, organizing and scheduling games, sharing television revenues and ticket receipts, and administering a joint player selection system (the "draft") whereby negotiating rights to college and other non-NFL football players are allocated among the teams. In addition, when the NFL expands and accepts a new team into the League, existing clubs help stock the expansion franchise by making players available from their own rosters. Sections 3.1 and 4.3, challenged in this action, represent two other ways in which the teams have chosen to act concertedly.

This lawsuit arose because of the decision by the Los Angeles Rams football team, a member of the NFL, to discontinue playing home games in the Coliseum and instead to play them in Anaheim, a city located south of Los Angeles in Orange County, California. The change will be effective as of the 1980-81 football season. Thus, as matters now stand, the 1980-81 season will find the Coliseum without a professional football team for the first time since 1946, when the Rams started to play there. Because the Rams' departure will allegedly lead to a loss of revenue and other financial injury, and because the Coliseum believes that the County of Los Angeles should have a professional football team, the Coliseum now wishes to obtain another NFL team to replace the Rams. This replacement team could either be an existing team now located in another city, or could be a new team created by the

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[2] The teams do share the expense of the League office and engage in joint promotional activities.

NFL. The three-fourths vote requirement embodied in sections 3.1 and 4.3, however, looms as an obstacle blocking the attainment of the Coliseum's desires—an obstacle the Coliseum would like struck down.[3]

Before the court are defendants' motions to dismiss for lack of standing and justiciability,[4] and the Coliseum's motion for partial summary judgment under § 1 of the Sherman Act. After considering the pleadings, the memoranda of law, the affidavits of William R. Robertson, Gary W. Hoecker, and Pete Rozelle, and the oral argument of counsel, the court rules that the motions to dismiss should be granted with leave to amend and that the motion for partial summary judgment should be denied.

I. MOTIONS TO DISMISS

The NFL and its member teams assert in companion motions to dismiss that the Coliseum lacks standing to bring this action and that this matter is not justiciable. The standing and justiciability issues overlap to a significant degree and so will be considered together, under the rubric of standing.

In resolving the standing question, the court's lodestar must be the language of § 16 of the Clayton Act, 15 U.S.C. § 26. Section 16, in relevant part, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive

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[3] The Coliseum alleges that sections 3.1 and 4.3 of the NFL's Constitution and By-laws "have had, and continue to have, the direct effect of precluding and impeding plaintiff from successfully conducting . . . negotiations with the owners of NFL franchises for the relocation of such a franchise to Los Angeles." Supplemental and Amended Complaint for Injunctive Relief under the Antitrust Laws, ¶ 19 at 9. The Coliseum further alleges that these provisions "preclude and impede plaintiff from initiating efforts to have established a new NFL franchise for Los Angeles." *Id.*

[4] The Chargers Football Company (San Diego Chargers) has not filed an answer to the complaint, has not joined in the motions to dismiss filed by the other defendants, and has not joined in opposing the motion for partial summary judgment filed by the Coliseum. At oral argument on January 8, 1979, the court was informed that, as of that date, the Chargers had not yet been served with a copy of the summons and complaint.

> relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

The key Ninth Circuit decision construing § 16 is *In re Multidistrict Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.), *cert. denied,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973) ("*Vehicle Air Pollution*"). In *Vehicle Air Pollution,* the court found that plaintiffs, who were crop farmers, had standing to seek injunctive relief under § 16. The gist of the farmers' antitrust complaint was that the nation's automobile manufacturers had conspired to eliminate competition in the research, development, manufacture, installation, and patenting of automobile air pollution control devices; that this conspiracy had retarded the development of such devices; and that as a result thereof the farmers had suffered lower crop yields because of additional air pollution.

A. ***Injury to Plaintiff***

The Ninth Circuit in *Vehicle Air Pollution* held that a plaintiff must allege an injury cognizable in equity to gain standing under § 16. The farmers in that case met this requirement by alleging that defendants' antitrust violations had caused diminished crop yields. In the case at hand, the Coliseum alleges that it faces a loss of revenue resulting from the relocation of the Rams to Anaheim and the Coliseum's asserted inability to procure a transfer or an expansion team because of the obstacles created by the challenged sections of the NFL's Constitution and By-laws. This alleged loss of revenue is analogous to the farmers' loss of revenue due to diminished crop yields and is an injury cognizable in equity.

The NFL and its member teams contend, nevertheless, that the Coliseum has not alleged a sufficiently immediate

injury to satisfy the "case or controversy" requirement of Article III of the Constitution. "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea* v. *Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1973). Defendants point out that the Coliseum's alleged loss of revenue, resulting from its loss of a professional football team as a tenant, will not occur—if at all—until well over a year from now. It is possible, defendants argue, that before the 1980-81 football season dawns, the NFL clubs will vote either to allow an existing team to move to the Coliseum or to allocate an expansion team for Los Angeles and the Coliseum. As of now, no votes, either affirmative or negative, have been taken. In a nutshell, the defendants say that nothing actually has happened and that the Coliseum is merely seeking an advisory opinion from this court.

Defendants' argument is clearly at odds with the language of § 16 of the Clayton Act. Section 16 specifically declares that a plaintiff may sue for "threatened loss or damage." As the Supreme Court held in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969):

> [Section 16] authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury . . .; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. [Footnote omitted.]

Plainly, this suit need not be postponed by the Coliseum until it actually suffers injury by finding itself at the commencement of the 1980-81 season without the Rams or any other professional football team as a tenant.

Zenith Radio teaches that not only must there be a threat of injury, but that the threat must be significant for injunctive relief to be granted. To satisfy the requirement of significant threat of injury and to withstand a motion to dismiss for lack of standing the Coliseum must allege: 1) that the Rams will

cease playing home games at the Coliseum as of the 1980-81 season; and 2) that it is reasonably likely that, before the start of the 1980-81 season, the NFL clubs will not approve the transfer of an existing team to the Coliseum or the placement of an expansion team there.

Defendants assert, however, that these two allegations describe a threatened injury too speculative to pass the "case or controversy" test. They rely principally on the abortion decision, *Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In *Roe,* although the wife was not pregnant and thus not immediately faced with a denial of an abortion, a married couple sought to challenge Texas statutes that generally prohibited abortions. The Supreme Court held that the couple lacked standing because their injury was too speculative and indirect. "Their alleged injury [the denial of an abortion] rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health." *Id.* at 128, 93 S.Ct. at 714.

The situation in the instant case is a far-cry from that presented in *Roe.* The Supreme Court's decision in *Roe* seems to rest on the belief that the contingencies present in that case had only a slight chance of occurring. Here, two things must happen before the Coliseum suffers actual injury, but one of these—the Rams' move to Anaheim—cannot be considered a contingency since both sides agree that it will in fact occur. With respect to the remaining contingency—the possible negative vote of the NFL owners on the question of a new team for Los Angeles—it has, to say the least, some fair chance of occurring.[5] Thus, the Coliseum's threatened injury cannot be considered speculative or indirect.

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[5] As to whether the contingency remaining in this case has a sufficient change of occurring, the situation here, rather than being akin to *Roe,* seems to be closer to *Industrial Communications Systems, Inc.* v. *Pacific Telephone & Telegraph Co.,* 505 F.2d 152 (9th Cir. 1974). There the Ninth Circuit found a sufficient allegation of threatened injury under § 16 where two contingencies stood between the threat and the occurrence of injury. The complaint alleged that defendants Pacific Telephone & Telegraph Co. and General Telephone Co. were threatening to injure plaintiffs by proposing to enter the one-way

(footnote continues)

Therefore, the Coliseum can satisfy the injury requirement of the § 16 standing test by making the allegations, numbered one and two, set forth above. The complaint does allege that the Rams will leave the Coliseum as of the 1980-81 season. But that pleading does not allege the second element—that it is reasonably likely that, prior to the 1980-81 season, the NFL clubs will not approve the transfer of an existing team to the Coliseum or the placement of an expansion team therein. Therefore, the motion to dismiss must be granted with leave to amend.

B. ***Proximate Cause***

The requirement of proximate cause limits the class of persons granted judicial relief by precluding certain persons from obtaining any recovery, even though their injuries were caused by defendant's violation of a duty. As Dean Prosser aptly put it:

> [Proximate cause] is sometimes said to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that this becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.

W. Prosser, *Law of Torts* 244 (4th ed. 1971).

The NFL and the member clubs assert that a proximate cause limitation developed under § 4 of the Clayton Act, 15 U.S.C. § 15, the so-called "target area requirement," applies with more or less equal strength to § 16 situations. Section 4 delineates the persons who may sue for treble damages for

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(footnote continued)

radio signaling business in Los Angeles in violation of the antitrust laws. The Ninth Circuit found that plaintiffs had standing even though the California Public Utilities Commission still had to approve the defendants' tariffs and the Federal Communications Commission still had to grant the requisite radio licenses before the defendants could enter the market.

violation of the antitrust laws.[6] To limit the number of persons who may reap the benefit of treble damages, the Ninth Circuit held in *Vehicle Air Pollution,* and in other cases, that standing under § 4 will be granted only to those whose injury is within the "target area" of the antitrust violation.[7]

Though the court in *Vehicle Air Pollution* did not specifically address the issue raised by the defendants here, it is clear from the opinion that the target area approach is irrelevant to the question of standing under § 16. The crop farmers in that case were denied standing under § 4 because their injury was not within the target area of the alleged conspiracy by the automobile manufacturers.[8] But the farmers were granted standing under § 16. The only conclusion that can be drawn from these companion holdings is that the target area requirement is inapplicable to the § 16 analysis. Furthermore, the very thing that prompted this Circuit to adopt the target area approach—the availability of treble damages under § 4—is absent from a suit for injunctive relief under § 16. As the court stated in *Vehicle Air Pollution,* standing requirements under

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[6] Section 4 of the Clayton Act, 15 U.S.C. § 15, reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[7] The Ninth Circuit most recently defined the "target area" test in *Solinger* v. *A & M Records, Inc.,* 586 F.2d 1304, 1311 (9th Cir. 1978): "In order to have standing under section 4 . . . , [plaintiff] must show that the injury occurred within an area of the economy that foreseeably would have been affected by the antitrust violation alleged."

[8] The court in *Vehicle Air Pollution* stated that:

> [The] area of the economy against which anticompetitive conduct was allegedly directed was that concerned with research, development, manufacture, installation and patenting of automotive air pollution control devices. No commercial interest of the crop farmers falls within this area. Not only were the crop farmers not targets of the alleged conspiracy, they were not even on the firing range.

481 F.2d at 129 (footnote omitted). The court went on to state that plaintiffs who fall within the target area would "include an alleged inventor and a manufacturer of motor vehicle air pollution control equipment who claim losses from asserted inability to market their devices." *Id.* at 129 n.10.

§ 16 can be more lenient than those under § 4 because "section 16 does not involve punitive and potentially disastrous judgments for treble damages and attorneys' fees; neither is there the potential threat of duplicative recoveries." 481 F.2d at 130 (footnote omitted).

Though the strict target area test of proximate cause is inapplicable to this case, to have standing, the Coliseum must nevertheless allege that its injuries will be "proximately caused" by the defendants' challenged rules. *Universal Brands, Inc.* v. *Philip Morris, Inc.*, 546 F.2d 30 (5th Cir. 1977), *cited with approval in John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 500 n.5 (9th Cir. 1977). The Coliseum has adequately pled proximate cause.

C. *Causation in Fact*

Finally, to be granted standing, the Coliseum must allege that the NFL's Constitution and By-laws will in fact cause the Coliseum to be without a professional football team as a tenant, resulting in a loss of revenue. *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

To allege the necessary causal relationship, it would seem that the Coliseum must, at a minimum, allege that it is reasonably likely that the NFL clubs will not approve a transfer to Los Angeles or an expansion team for Los Angeles prior to the 1980-81 season. For if the clubs are in fact willing to approve a replacement team, it could not be said that the three-fourths vote requirement, embodied in sections 3.1 and 4.3 of the NFL's Constitution and By-laws, will cause the Coliseum any harm.

Furthermore, as the defendants point out, a number of things could happen that would prevent the Coliseum from obtaining a team regardless of whether the owners vote to deny a replacement team for Los Angeles. For example, a transfer or an expansion team might decide to play in a stadium in Los Angeles County other than the Coliseum. If such were true, then, as far as the Coliseum is concerned, any vote of the team owners would be irrelevant. Thus, the question arises whether, to allege causation, the Coliseum must allege that the likely

future events are such that the only thing blocking it from obtaining a team is the probable negative vote of the owners. In other words, must the Coliseum allege that injunctive relief will, if granted, significantly affect its chances to obtain another team?

As discussed earlier, the Supreme Court in *Zenith Radio* held that a § 16 plaintiff must "demonstrate a significant threat of injury . . . from a contemporary violation [of the antitrust laws] likely to continue or recur." 395 U.S. at 130, 89 S.Ct. at 1580. If, for example, it is likely that the only team that wants to move to Los Angeles desires to play in the Rose Bowl, then there is no *significant* threat of injury to the Coliseum *resulting from* section 4.3 of the NFL's Constitution and By-laws, the section that relates to the transfer of teams. Thus, to state the requisite "significant threat," the Coliseum must allege a reasonable likelihood that an affirmative vote by the club owners would bring a team to the Coliseum.

The court's conclusion is supported by the recent holdings of the Supreme Court on the question of standing to sue. In *Warth* v. *Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), plaintiffs challenged the legality of the zoning ordinance of the town of Penfield, New York. They alleged that the ordinance had the purpose and effect of excluding persons of low and moderate income from living in Penfield. Among the plaintiffs were four low and moderate income individuals who desired to live in Penfield, but who allegedly were precluded from doing so by the ordinance. The Court denied them standing. It said that even if the ordinance had the effect of excluding low and moderate income individuals, the plaintiffs had failed to allege that builders stood ready to construct housing at a price plaintiffs could afford, if the ordinance were struck down. Without such an allegation, no actionable causal relationship could be said to exist, nor could it be said that court-ordered relief would benefit the plaintiffs in a tangible way. It follows, therefore, that just as the plaintiffs in *Warth* had to allege that the likely future actions of builders were such that the only thing blocking their access to housing in Penfield was the challenged ordinance, the Coliseum here must allege that the likely future events are such that the only thing

preventing it from obtaining a transfer or an expansion team is the probable negative vote of more than one-fourth of the owners.

The standard this court must apply, in deciding whether court-ordered relief would benefit the Coliseum in a tangible way and whether an actionable causal relationship exists, was most recently stated by the Supreme Court in *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41-42, 96 S.Ct. 1917, 1924, 1926, 48 L.Ed.2d 450 (1976):

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.
>
> . . . .
>
> . . . [T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party . . . .

Accord, Starbuck v. *City & County of San Francisco,* 556 F.2d 450 (9th Cir. 1977); *Bowker* v. *Morton,* 541 F.2d 1347 (9th Cir.1976).

Thus, with respect to the claim that section 4.3 violates the antitrust laws and precludes the Coliseum from obtaining a transfer team, the complaint must allege the following to set forth an actionable causal relationship indicating that court-ordered relief would benefit the Coliseum:

1) that it is reasonably likely that an existing NFL team is seriously interested in moving to Los Angeles;

2) that it is reasonably likely that a transfer team would decide to play its home games in the Coliseum;

3) that it is reasonably likely that the transfer team and the Coliseum would be able to agree on lease terms; and

4) that it is reasonably likely that pursuant to section 4.3, the NFL members will not approve the transfer of an existing team to Los Angeles and the Coliseum before the 1980-81 season.

Elements one and two are adequately alleged in the Coliseum's complaint, but not elements three and four. Therefore, the complaint is dismissed with leave to amend.

Similarly, with respect to the claim that section 3.1 violates the antitrust laws and precludes the Coliseum from obtaining an expansion team, the following must be alleged:

1) that it is reasonably likely that the NFL will not place an expansion team in Los Angeles and the Coliseum before the 1980-81 season;

2) that it is reasonably likely that an owner can be found for an expansion team in Los Angeles;

3) that it is reasonably likely that an expansion team would decide to play in the Coliseum; and

4) that it is reasonably likely that an expansion team and the Coliseum would be able to agree on lease terms.

None of these facts have been alleged. Again, therefore, the complaint must be dismissed with leave to amend.

In conclusion, the motion to dismiss is granted with leave to amend so that the Coliseum may adequately plead the existence of threatened injury and causation in fact, as more particularly set forth above. This is necessary to insure that the Coliseum "has 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth* v. *Seldin*, 422 U.S. at 498-99, 95 S.Ct. at 2205.

II. MOTION FOR PARTIAL SUMMARY JUDGMENT

The Coliseum moves for partial summary judgment on the ground that sections 3.1 and 4.3 of the NFL's Constitution and

By-laws violate § 1 of the Sherman Act. Because the Coliseum has not adequately pled standing, a jurisdictional requirement in federal courts, partial summary judgment may not be granted irrespective of the merits of the Coliseum's claim.

In all likelihood, however, the Coliseum will be able to state the necessary allegations in its amended complaint. Accordingly, the court believes it appropriate to address at this time the issues raised by the Coliseum's motion so that this litigation may move forward expeditiously.

A. *Are NFL Teams Economic Competitors?*

The dominant purpose of § 1 of the Sherman Act is to maintain competition among independent business firms. L. Sullivan, *Antitrust* 152-54 (1977). The NFL and its member teams assert that the teams are not independent firms who engage in economic competition but rather are joint venturers,[9] and as such are beyond the reach of § 1 of the Sherman Act.

Whether NFL teams engage in economic competition as independent units is a troublesome question.[10] The relationship between the teams does not fit the traditional competitive

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[9] Strictly speaking, the NFL teams are not engaged in a joint venture. "A joint venture is a joint business undertaking of two or more parties who share the risks as well as the profits of the business." 10 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 73.08[1], at 73-165 (1977) (footnote omitted). Though the NFL teams share revenues, they do not share profits or losses.

[10] The opinion of the Court of Appeals for the District of Columbia in *Smith* v. *Pro Football, Inc.*, 193 U.S.App.D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978, as amended on Jan. 31, 1979), illustrates the confusion surrounding the question whether NFL teams are economic competitors. In discussing whether to apply the *per se* or the rule of reason test of illegality under § 1 of the Sherman Act, the court flatly stated that "the NFL clubs which have 'combined' to implement the draft are not *competitors* in any economic sense. The clubs operate basically as a joint venture . . . ." Slip opinion at 24-25, 593 F.2d at 1178-1179 (footnote omitted). Yet in applying the rule of reason to the NFL draft, the court held that the draft "is undeniably anticompetitive both in its purpose and in its effect." *Id.* at 31, 593 F.2d at 1185. The court went on to say that: "The draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers [the NFL teams] for the services of sellers." *Id.* at 32, 593 F.2d at 1186.

mold. As defendants point out, in certain areas cooperation among the teams, not competition, is required to produce an entertainment product. For example, the teams must adopt playing rules and agree to a playing schedule. In addition, the teams cooperate in a number of other significant ways, though this cooperation may or may not be essential to producing an entertainment product. For example, live gate receipts from all regular season games are divided "sixty-forty" between the home and visiting teams, after certain limited deductions are made. The television rights of all NFL teams are jointly sold to the networks and television revenue is divided equally among all the teams. With regard to expenses, the teams share the cost of the NFL office and the cost of conducting promotional activities. Finally, the teams cooperate in administering a player draft designed to promote competitive balance on the playing field. Competitive balance heightens spectator interest which translates into greater revenue for the NFL.

On the other side of the ledger, each NFL team is separately owned. Profits and losses are not shared. The teams compete for college players and NFL players who are "free agents."[11] This competition for players has an economic aspect because winning teams may bring in more revenue. Depending on their proximity, teams also may compete for fans. If another NFL team were to play its home games in the Coliseum, that team and the Rams would compete to some extent for fan support in the Southern California area and thus for ticket sales and other revenue. At present, the location of the San Francisco Forty-niners vis-a-vis the Oakland Raiders, the location of the Baltimore Colts vis-a-vis the Washington Redskins, and the location of the New York Jets vis-a-vis the New York Giants, suggests that these pairs of teams compete for dollars found in the pockets of football fans.

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[11] When a player signs a Standard Player Contract with a team, he becomes bound to that team for a certain period of time. Once that period expires, however, he then may become a free agent and negotiate a new contract with another team. *Mackey* v. *National Football League*, 543 F.2d 606, 610 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

Moreover, the fact that NFL teams cooperate or act concertedly in a number of significant ways is ambiguous evidence on the question whether they are economic competitors. These cooperative efforts may indicate the presence of antitrust violations rather than the existence of a joint venture that is immune from the antitrust laws. In fact certain cooperative practices adopted by the NFL that unduly restrict competition for players have been struck down as violative of the antitrust laws. *Smith* v. *Pro Football, Inc.*, 193 U.S.App.D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978, as amended on Jan. 31, 1979) (NFL player draft held to be unreasonable restraint of trade in violation of § 1 of the Sherman Act); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) (so-called "Rozelle Rule," which had the effect of restricting the movement of free agents between teams, held unlawful); *Kapp* v. *National Football League*, 390 F.Supp. 73 (N.D.Cal.1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978) (Rozelle Rule, NFL player draft, the "no tampering rule," and the Standard Player Contract held violative of the antitrust laws).

Furthermore, even if the court accepts the contention that the NFL teams are joint venturers, this does not necessarily mean that they are not economic competitors for purposes of § 1 of the Sherman Act. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), the defendant companies attempted to justify the challenged restraints of trade by characterizing their operations as a joint venture. The Supreme Court rejected this argument:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

Id. at 598, 71 S.Ct. at 975. Since the NFL teams are legally separate companies, the Supreme Court's reasoning would arguably apply to this case.

The court concludes that competition for players and, depending on a team's location, competition for fans, indicates that the NFL teams are economic competitors, though not in the traditional sense. This view is supported by a number of cases where courts have held that the rules of a professional sports league violated § 1 of the Sherman Act. In reaching that conclusion, these courts necessarily found that the teams making up the league were engaged in economic competition. *Smith* v. *Pro Football, Inc., supra; Mackey* v. *National Football League, supra; Kapp* v. *National Football League, supra; Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1056-57 (C.D.Cal.1971), *stay vacated sub nom., Haywood* v. *National Basketball Association*, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Douglas, J., in chambers). *See Robertson* v. *National Basketball Association*, 389 F.Supp. 867, 893-96 & 67 F.R.D. 691, 694 n.3 (S.D.N.Y.1975); *Nassau Sports* v. *Hampson*, 355 F.Supp. 733 (D.Minn.1972); *Boston Professional Hockey Association, Inc.* v. *Cheevers*, 348 F.Supp. 261, 267 (D.Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972).[12]

B. ***Sherman Act § 1 Analysis***

Section 1 of the Sherman Act, 15 U.S.C. § 1, in relevant part provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ." While this language, read literally, could outlaw nearly every type of commercial understanding, the Supreme Court long ago held that only those agreements that impose an unreasonable restraint on competition are prohibited. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

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[12] Defendants cite *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974), and *Levin* v. *National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y.1974), in support of their argument that they are members of a joint venture, and are not economic competitors. Both cases, however, merely held that the actions complained of did not have any anticompetitive effect, and both courts noted that joint action by members of a professional sports league can have antitrust implications.

In evaluating whether a particular restraint is unreasonable and thus unlawful, courts have developed two complementary modes of analysis. On the one hand, there is the rule of reason. Under it, the competitive effect of a restraint is determined only after analyzing the facts peculiar to the business, the nature of the restraint and its effects, the history of the restraint, and the reasons why the restraint was imposed. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 244, 38 S.Ct. 242, 62 L.Ed. 683 (1918). On the other hand, certain types of restraints are considered so plainly anticompetitive that they are deemed "illegal *per se.*" Under this mode of analysis, no elaborate study of the industry is made and the purported justifications for the restraint are not considered. *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

1. Per Se Illegality

The Coliseum challenges the validity of sections 3.1 and 4.3 of the NFL's Constitution and By-laws on the ground that these sections are *per se* illegal under § 1 of the Sherman Act. The *per se* rule is a judicial shortcut applied to those types of business agreements that the courts, after considerable experience, have found to be consistently unreasonable and therefore, plainly anticompetitive. As the Supreme Court stated in *Northern Pacific R. Co.* v. *United States:*

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

356 U.S. at 5, 78 S.Ct. at 518.

One type of agreement courts have found to be so pernicious as to be illegal *per se* is "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 608, 92 S.Ct. 1126, 1133,

31 L.Ed.2d 515 (1972). In *Topco*, the Supreme Court struck down an agreement between operators of independent supermarket chains to allocate territories. Professor Sullivan succinctly summarized the facts in *Topco:*

> [The independent operators'] stores competed with other grocery stores, including those of the large national and regional chains. Those large chains sold nationally advertised products and also utilized so called "house brands" which they had packed for them with their own trade names and marks. None of the independent operators was large enough, alone, to have a house brand, so they all formed a subsidiary which adopted the Topco brand and mark. This subsidiary purchased products bearing this brand label from packers, much as the large chain grocers did, and distributed these name brand products to the participating independents. The arrangement also included provisions to protect the territories of the participating independents from one another.

L. Sullivan, *Antitrust* 216, 217 (1977).[13]

Sections 3.1 and 4.3 limit the ability of transfer and expansion teams freely to select their home cities. The Coliseum contends that these sections therefore constitute an illegal allocation of territories under *Topco.*[14] Although the sections

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[13] The district court applied the rule of reason to Topco's practices and held that they were procompetitive and thus reasonable because they promoted competition between the independents and the large chains. The Supreme Court rejected this finding, not because the Court questioned its validity, but because it found that the defendants had engaged in a clear allocation of territories and that therefore a *per se* violation of § 1 existed. As the Court put it, the inability of courts "to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules." 405 U.S. at 609-10, 92 S.Ct. at 1134.

[14] Another practice that is proscribed by the *per se* rule is the group boycott. *E.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). A group boycott "is a concerted attempt by a

(footnote continues)

may be characterized as agreements to allocate territories, the court believes that it would be inappropriate in the circumstances of this case to apply *Topco's per se* rule.

The reason why this case differs from *Topco* is that the economic competitors here must act concertedly—i.e., they must cooperate to some extent for competition to take place at all. If the teams did not cooperate, a professional football league such as the NFL would not exist and economic competition among the teams would then not occur.[15] For example, as discussed earlier, the teams must cooperate to the extent of agreeing on playing rules and playing schedules, or no games would be played and no league would exist.

Moreover, sections 3.1 and 4.3, the very sections challenged here, appear, on their face, to promote competition to some degree. The reason for this observation is as follows: In order for professional football games to be played (and thus for economic competition to exist), the teams must not only agree

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(footnote continued)

group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level." *Smith* v. *Pro Football, Inc.*, slip opinion at 24 of 193 U.S.App.D.C., at 1178 of 593 F.2d (footnote omitted).

With respect to section 3.1 of the NFL's Constitution and By-laws, which requires a three-fourths vote before a new member may be admitted into the NFL, an argument could be made that not only is it an agreement to allocate territories, but that it is also, in part, a group boycott. If one were to argue that section 3.1 is *per se* illegal insofar as it requires a three-fourths vote before *any* new team may be admitted into the NFL, then one would be contending, under the definition of a "group boycott" set forth above, that section 3.1 is an illegal group boycott of new teams. But since the Coliseum is contending only that section 3.1 is an illegal allocation of territories, its argument must only be that section 3.1 is *per se* illegal insofar as it requires a three-fourths vote to determine the *location* of an expansion team.

[15] Theoretically, without an organized league, professional football teams could still independently arrange to play exhibitions against one another and thus could continue to compete in the economic arena for players and fans. But the history of professional sports in this country indicates that professional teams, with rare exceptions (such as the Harlem Globetrotters), exist only in the context of a league structure.

on *how* the games are to be played, by adopting playing rules, and *who* the participating teams are to be, by adopting playing schedules, but also must agree on *where* the games are to be played. Games, traditionally, are played where one of the participating teams has its home city. Therefore, an agreement on where the games are to be played necessarily involves an agreement on the location of each team's home city. Sections 3.1 and 4.3 provide a mechanism whereby the NFL teams can agree on where each transfer or expansion team is to be located—to that extent these sections are agreements on where games are to be played. Because some sort of agreement is needed to determine where each team is to have its home city, however, this does not necessarily mean that it is reasonable and thus legal for the agreement to contain a three-fourths vote requirement, as provided in sections 3.1 and 4.3. In fact, it may be that the only type of agreement that is reasonable is one whereby the teams agree that an existing or a new team may play its home games in whichever city it selects. But this does not detract from the fact that an agreement regarding the location of teams, whatever its terms, does to some extent promote competition by determining where games are to be played, thereby making it possible for the sports events to take place.

Thus, sections 3.1 and 4.3 cannot be deemed *per se* illegal under the standards set forth in *Northern Pacific R. Co.* Because these agreements promote competition to some extent, it cannot be said that they have a "pernicious effect on competition" or that they lack "any redeeming virtue." *Northern Pacific R. Co.*, 356 U.S. at 5, 78 S.Ct. at 518. Wooden application of the *per se* rule in this context would risk outlawing provisions that may be reasonable and thus lawful.

Other courts, when faced with ruling on the antitrust implications of the NFL's cooperative agreements, have concluded that it would be inappropriate to apply the *per se* standard. *Smith* v. *Pro Football, Inc., supra; Mackey* v. *National Football League, supra; Kapp* v. *National Football League, supra. But see Bowman* v. *National Football League,* 402 F.Supp. 754 (D.Minn.1975).

It follows, therefore, that the legality of sections 3.1 and 4.3 must be tested under the rule of reason.

2. Rule of Reason

Under the rule of reason, the court must balance the anticompetitive evils of the challenged restraints against their procompetitive virtues to determine whether the restraints are reasonable and thus legal. As stated by the Supreme Court in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." In examining the challenged restraints, the court must look to both their purpose and effect. L. Sullivan, *Antitrust* § 71 (1977). The court may not, however, consider virtues possessed by the restraints that are not procompetitive in nature. *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). According to *Professional Engineers:*

> [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692, 98 S.Ct. at 1365.[16]

The Coliseum argues that if its *per se* analysis is not accepted, the court nevertheless should at this time invalidate sections 3.1 and 4.3 under the rule of reason. The Coliseum contends that the challenged sections are anticompetitive in that

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[16] In *Professional Engineers,* the Court considered the legality of a canon of ethics promulgated by the National Society of Professional Engineers that prohibited the member engineers from engaging in competitive bidding. The Society justified the restraint as being in the public interest because price competition assertedly would result in inferior engineering work which in turn would endanger the public safety. The Court held that this was not a procompetitive justification and therefore was irrelevant to the reasonableness analysis. It thus affirmed the court of appeals' ruling striking down the canon.

they assertedly insulate the Rams from competition—with respect to gate receipts, other revenues, and players—that would exist if another NFL team were playing in the Coliseum. The Coliseum further contends that the justifications offered in support of sections 3.1 and 4.3 represent, on their face, nothing more than a desire on the part of the NFL teams to maximize profits. Though profit maximization is certainly in the best interests of the football industry, it is not, by itself, a procompetitive justification and, under *Professional Engineers,* may not be factored into the reasonableness determination. The Coliseum concludes therefore, that since there is nothing on the procompetitive side of the scale to balance out the anticompetitive effect of the sections, they are unreasonable and illegal under § 1 of the Sherman Act.

The NFL and its member teams argue that they have a lawful and important interest in the location of each of the teams. This interest assertedly arises because the teams share gate receipts and television revenues, because of problems involving travel costs, and because of problems involving the geographic alignment of the NFL. At this stage of the case, the record on how these items translate into procompetitive justifications has not been developed.

At the heart of the Coliseum's argument is its assertion that, on their face, the justifications offered for sections 3.1 and 4.3 are not procompetitive. But the Coliseum is incorrect because, as stated above, these sections on their face do have a procompetitive aspect.

A final determination of whether sections 3.1 and 4.3 are illegal under the rule of reason cannot be made at this stage of the litigation. Aside from the fact that the Coliseum has not properly alleged standing, the record is devoid of evidence necessary to make this determination. Further evidence needs to be submitted concerning the business of professional football, the nature of the restraints and their effects, their history, and the reasons why they were imposed.

The court, of course, intimates no opinion on whether the challenged sections of the NFL's Constitution and By-laws are unreasonable restraints of trade under § 1 of the Sherman Act.

CONCLUSION

The motions to dismiss the Coliseum's complaint are granted with leave to amend within thirty days to enable the Coliseum adequately to allege standing.

The motion for partial summary judgment filed by the Coliseum is denied. Final determination cannot be made of the Coliseum's claim under § 1 of the Sherman Act until standing is properly alleged. In addition, though the NFL teams are economic competitors, for the reasons set forth above it is inappropriate to apply the *per se* analysis to the challenged sections of the NFL's Constitution and By-laws. Application of the rule of reason must be postponed until the record has been fully developed.

THEREFORE, IT IS SO ORDERED.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Cross-Defendants.

FINAL DECREE

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2) [sic].

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have

unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-claimant each shall have and recover its costs of suit, including a reasonable attorneys' fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

Dated: June 14, 1982.

HARRY PREGERSON

UNITED STATES CIRCUIT JUDGE
Sitting by Designation

APPENDIX F

APPENDIX F

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 82-5572, 82-5573, 82-5574, 82-5664
82-5665, 83-5714, 83-5732, 83-5938

LOS ANGELES MEMORIAL COLISEUM COMMISSION, *et al.*,
Plaintiff/Appellee,

v.

NATIONAL FOOTBALL LEAGUE, etc., *et al.*,
Defendants/Cross-Defendants/Appellants,

v.

OAKLAND RAIDERS, LTD.,
Cross-Claimant/Appellee.

Before:

ANDERSON and NELSON,
Circuit Judges,

and S. WILLIAMS,
*District Judge**

ORDER

Judges Anderson and Nelson vote to deny panel rehearing. Judge Williams would grant panel rehearing. The panel has voted to reject the suggestion for rehearing *en banc.*

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for *en banc* rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc.* Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

APPENDIX G

APPENDIX G

STATUTES INVOLVED

SHERMAN ACT

15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

FOOTBALL LEAGUE CONSOLIDATION ACT

P.L. 89-800 (1966), 15 U.S.C. § 1291:

The antitrust laws . . . shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of Title 26, combine their operations in an expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.